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PUTNEY

Real Property
Abstracts
Mining Law

EXAMINATION QUESTIONS

BY

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VOLUME VI

Published by the
CREE PUBLISHING COMPANY
MINNEAPOLIS

v. 6

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P9838p
1908

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CREE PUBLISHING CO.
Minneapolis, Minn.

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Brethren Publishing House, Elgin, Illinois.

TABLE OF CONTENTS—VOLUME VI.

SEVENTEENTH SUBJECT—REAL PROPERTY.

CHAPTER I.

INTRODUCTORY.....	11
Section 1 Real Property.....	11
“ 2 Feudal System.....	11
“ 3 Livery of Seisin.....	19
“ 4 Scope of this Subject.....	22
“ 5 Authorities.....	22
“ 6 Ownership, Possession and Enjoyment.....	27
“ 7 Land.....	29
“ 8 Tenements.....	30
“ 9 Hereditaments.....	31
“ 10 Incorporeal Hereditaments.....	31
“ 11 Easements.....	32
“ 12 Fixtures.....	33
“ 13 Emblements.....	33
“ 14 Estates and Titles.....	34

CHAPTER II.

ESTATES CLASSIFIED AS TO QUANTITY.....	35
Section 15 Classification.....	35
“ 16 Freeholds.....	35
“ 17 Estates of Inheritance.....	36
“ 18 Fee-Simple.....	36
“ 19 Estates in Fee-Tails.....	38
“ 20 Life Estates.....	45
“ 21 Conventional Life Estates.....	45
“ 22 Legal Life Estates.....	47
“ 23 Homestead.....	50
“ 24 Estates Less than Freeholds.....	51
“ 25 Estates for Years.....	52
“ 26 Estates at Will.....	52
“ 27 Estates from Year to Year.....	52
“ 28 Estates at Sufferance.....	53

CHAPTER III.

ESTATES CLASSIFIED AS TO QUALITY.....	55
Section 29 In General.....	55
“ 30 Fee-Conditionals.....	56
“ 31 Estates on Condition.....	56
“ 32 Conditions Precedent.....	56
“ 33 Estates on Condition Subsequent.....	57

Section 34	Restrictions.....	58
“ 35	Estates on Limitation.....	58
“ 36	Comparison Between Estates upon Limitation and Estates upon Condition Subsequent.....	58
“ 37	Conditional Limitations.....	59

CHAPTER IV.

ESTATES CLASSIFIED AS TO TIME OF THEIR ENJOYMENT.....	61
Section 38 In General.....	61
“ 39 Reversions.....	61
“ 40 Remainders.....	61
“ 41 Classification of Remainders.....	62
“ 42 Contingent Remainders.....	63

CHAPTER V.

ESTATES CLASSIFIED AS TO THE NUMBER OF OWNERS.....	77
Section 43 In General.....	77
“ 44 Joint Tenancy.....	77
“ 45 Tenancy in Common.....	78
“ 46 Estates by Entirety.....	79
“ 47 Estates in Coparcenary.....	79
“ 48 Partnership Estates.....	80

CHAPTER VI.

TITLES.....	81
Section 49 Titles.....	81
“ 50 Original Titles.....	82
“ 51 Title by Discovery.....	84
“ 52 Title by Occupancy.....	84
“ 53 Title by Conquest.....	84
“ 54 Title by Cession.....	85
“ 55 Derivative Titles.....	85
“ 56 Title by Descent.....	85
“ 57 Title by Purchase.....	89
“ 58 Title Through Act of the Parties.....	89
“ 59 Public Grant.....	90
“ 60 Private Grants.....	91
“ 61 Devise.....	92
“ 62 Executory Devisees.....	92
“ 63 Titles by Operation of Law.....	105
“ 64 Titles Arising from Natural Causes.....	105
“ 65 Titles Arising from Civil or Political Relations.....	105
“ 66 Titles Arising from Public Policy.....	107

CHAPTER VII.

CONVEYANCE OF REAL PROPERTY.....	109
Section 67 Grantors and Grantees.....	109
“ 68 Requisites of a Deed.....	109

Section 69	The Writing and the Material.....	110
" 70	Consideration of a Deed.....	110
" 71	Parts of a Deed.....	110
" 72	Covenants and Warranty.....	112
" 73	Signing and Sealing.....	113
" 74	Attestation and Acknowledgment and Registration.....	113
" 75	Delivery.....	114

CHAPTER VIII.

DESCRIPTION OF LAND.....	115
Section 76 In General.....	115
" 77 Exceptions and Reservations.....	115
" 78 American System of Land Parceling.....	116
" 79 Plats and Subdivisions.....	118

CHAPTER IX.

SPECIAL TOPICS IN REAL PROPERTY.....	119
Section 80 Contest in Legal History of England between Those Who Desired to Allow and Those Who Desired to Prevent the Alienation of Real Estate.....	119
" 81 The Rule in Shelley's Case.....	121
" 82 Legal and Equitable Estates.....	142
" 83 Testamentary Conveyances.....	143
" 84 Merger.....	143

CHAPTER X.

FORMS OF CONVEYANCES.....	145
Section 85 In General.....	145
" 86 Common Law Original Deeds.....	145
" 87 Common Law Derivative Deeds.....	145
" 88 Effect of Statute of Uses upon the English Law of Con- veyancing.....	146
" 89 Modern Deeds.....	147
" 90 Conveyances in Trust or by Way of Pledge.....	148

EIGHTEENTH SUBJECT—ABSTRACTS.

ABSTRACTS OF TITLE.....	151
Section 1 Definitions.....	151
" 2 The English Method.....	152
" 3 The American Method.....	153
" 4 Essentials of an Abstract.....	155
" 5 Examiner's Duties and Liabilities.....	156
" 6 Duty of Furnishing Abstract.....	159
" 7 Sources of Information.....	161
" 8 Doctrine of Notice.....	163
" 9 Registration.....	165
" 10 Indexes and References.....	167
" 11 Compilation of Abstracts.....	168

Section 12	Formal Parts of an Abstract.....	170
" 13	Substance of the Abstract-Initial Statements	172
" 14	Congressional Grants	176
" 15	Patents.	177
" 16	Deeds of Conveyance	178
" 17	Corporate Conveyances	181
" 18	Conveyances by Delegated Authority.	181
" 19	Official Conveyances.	183
" 20	Testamentary Conveyances.	184
" 21	Probate Proceedings.	187
" 22	Descents.	190
" 23	Liens, Charges, and Incumbrances.....	193
" 24	Lis Pendens	195
" 25	Attachment.....	197
" 26	Judgments and Decrees.	198
" 27	Judicial and Execution Sales	202
" 28	Actions and Proceedings	206
" 29	Taxes and Tax Titles.	212
" 30	Adverse Titles	216
" 31	Insolvency and Bankruptcy.....	219
" 32	Agreements for Conveyance	221
" 33	Leases.	223
" 34	Miscellaneous Evidence.....	225
" 35	What Title Should Be Shown.	229
" 36	Flaws in the Title.	231
" 37	Clouds upon Title	233
" 38	Inquiries in Pais.....	233
" 39	Opinions of Title.	236
" 40	Liability for Erroneous Opinions	239
" 41	Perusing an Abstract	241
" 42	Conclusion	243

NINETEENTH SUBJECT—MINING LAW.

CHAPTER I.

INTRODUCTORY AND HISTORICAL.....	247
Section 1 Definition.....	247
" 2 Mining Law a Branch of Law of Real Property	247
" 3 Comparison Between the Civil Law and the Common Law Rule as to the Ownership of Mines.....	248
" 4 "Royal Mines" in England.	249
" 5 Sources of Mining Titles in the United States.	251

CHAPTER II.

LAWS GOVERNING MINES.....	253
Section 6 Sources of Mining Law in the United States.....	253
" 7 United States Statutes.	253

CONTENTS.

vii

Section 8	State Statutes	255
" 9	Rules of Mining Districts.....	255
" 10	Mining Customs.....	257

CHAPTER III.

LANDS OPEN TO EXPLORATION AND PURCHASE AS MINES, UNDER THE STATUTES OF THE UNITED STATES.....		259
Section 11	Mineral Lands Open to Purchase by Citizens.....	259
" 12	Lands Which Cannot be Located on.....	260

CHAPTER IV.

WHO MAY LOCATE CLAIM.....		263
Section 13	In General.....	263
" 14	Aliens.....	263
" 15	Location by Agents.....	264

CHAPTER V.

KINDS AND EXTENT OF CLAIMS.....		265
Section 16	In General.....	265
" 17	Lodes and Veins.....	265
" 18	Tunnel Claims.....	270
" 19	Placer Claims.....	272
" 20	Coal Lands.....	273

CHAPTER VI.

ESSENTIALS OF VALID LOCATION.....		277
Section 21	In General.....	277
" 22	Location.....	277
" 23	Recording Location.....	279

CHAPTER VII.

ESTATE SECURED BY LOCATION.....		281
Section 24	In General.....	281
" 25	Extra-Lateral Rights.....	282
" 26	Rights Under Defective Location.....	284
" 27	Cross Veins.....	284
" 28	Placer Claim Containing Lode.....	285

CHAPTER VIII.

FORFEITURE, ABANDONMENT AND RELOCATION.....		287
Section 29	Abandonment.....	287
" 30	Failure to Perform Annual Labor.....	287
" 31	Forfeiture to Co-Owner.....	289
" 32	Relocation.....	291

CHAPTER IX.

PATENTS ON MINING CLAIMS.	293
Section 33 Statutory Provisions.	293

CHAPTER X.

SPECIAL TOPICS IN MINING LAW.	297
Section 34 Eminent Domain.	297
" 35 Respective Rights of the Parties when Surface and Mineral Estates are Severed.	297

Quiz Questions, Seventeenth Subject.	299
" " Eighteenth Subject.	307
" " Nineteenth Subject.	311
Appendix A, to Real Property.	315
" B, " " 	333
" C, " " 	341
Table of Cases, Seventeenth Subject.	349
" " " Eighteenth Subject.	352
" " " Nineteenth Subject.	355
Index, Seventeenth Subject.	359
" Eighteenth Subject.	361
" Nineteenth Subject.	363

SEVENTEENTH SUBJECT.

Real Property.



CHAPTER I.

INTRODUCTORY.

SECTION I. REAL PROPERTY.

Considerable confusion has arisen on account of the double use of the term real property; the term being used to represent both the tangible property itself and interests in such property. Not all interests in real property, however, are considered as real property; estates less than a freehold being considered personal property. A freehold is a life estate or an estate of inheritance. The reason why estates less than freehold are considered real property is to be found in the Feudal system. Under this system a life estate was the only estate which was considered worthy of acceptance by a freeman and all lesser estates were considered of such small importance that instead of being classed with freeholds, they were classed with the less important—personal property.

SECTION 2. FEUDAL SYSTEM.

The English law of real property from which the American law on this subject is taken in its entirety is based upon the Feudal system. The Feudal system has already been discussed under the subject of Legal History¹ and the following account from the Appendix to Thomas's Edition of Coke's Institutes is here inserted:

The feudal law was established by the nations which overturned the Roman empire. The first of

¹ Vol. I, Subject 2.

these were the Vandals, the Suevi, and the Alani. They inhabited the countries bordering on the Baltic. About the year 406, they made an irruption into Gaul; from Gaul, they advanced into Spain; about the year 415, they were driven from Spain by the Visigoths, and invaded Africa, where they formed a kingdom. About the year 431, the Franks, the Allemanni, and the Burgundians penetrated into Gaul. Of these nations, the Franks became the most powerful; and having either subdued or expelled the others, made themselves masters of the whole of those extensive provinces, which from them received the name of France. Pannonia and Illyricum were conquered by the Huns; Rhætia, Noricum and Vindelicia, by the Ostrogoths; and these were, some time after, conquered by the Franks. In 449, the Saxons invaded Great Britain. The Herulians marched into Italy, under the command of their king Odoacer, and in 476, overturned the empire of the West. From Italy, in 493, they were expelled by the Ostrogoths. About the year 568, the Lombards, issuing from the Mark of Brandenburg, invaded the Higher Italy, and founded an empire, called the kingdom of the Lombards. After this, little remained in Europe of the Roman Empire, besides the Middle and Inferior Italy. These, on the final division of that empire, between the sons of Theodosius, in 395, had fallen to the share of the emperor of the East, who governed them by an officer called the exarch, whose residence was fixed at Ravenna, and by some subordinate officers, called dukes. In 743, the exarchate of Ravenna, and all the remaining possessions of the emperor in Italy, were conquered by the Lombards. This, as it was the final extinction of the Roman empire in Europe, was the completion, in that quarter

of the globe, of those conquests which established the law of the feud.

The nations by whom these conquests were made, came, it is evident, from different countries, at different periods, spoke different languages, and were under the command of separate leaders; yet they appear to have established in almost every state, where their polity prevailed, nearly the same system of laws. This system is known by the appellation of the feudal law.

Sir Henry Spelman, after Cujus, defines a fief to be, "A right which the vassal hath in land, or some immovable thing of his lord's, to use the same and take the profits thereof, hereditarily, rendering unto his lord such feudal duties and services, as belong to military tenure; the mere propriety of the soil always remaining to the lord." This definition appears accurate and comprehensive; and an analysis of it may point out those peculiar and characteristic marks, which distinguish the feudal law from every other.

1st, Where the soil and the right of the profits of the soil, meet in the same person, he may be said to have an absolute and unmixed estate in his lands. This absolute and unmixed estate, the subject of every kingdom, not governed by the feudal polity so far as respects the relation between sovereign and subject, appears to possess. But, by the feudal law, with respect to the relation between the sovereign and the subject, the right to the soil and the right to the profits of the soil, were separate; the tenant being invested with the latter, the sovereign continuing to be entitled to the former. This right to the profits was of the most extensive nature; it gave the tenant, except for the purpose of alienation, the complete power or dominion over the land, during the term of his tenure.

Thus his estate and interest, as to the right of ownership, far exceeded that of the usufructuary in the civil law, to which it has sometimes been compared, as the usufructuary had a mere right to the ordinary profits of the usufruct, and was not permitted to make any change in it, even for its amelioration. It approached nearer to the estate of the *emphyteuta*, in the same law, as the *Dominium directum* was absolutely vested in him. It approached, perhaps, still nearer to the estate of a *cestui que trust* in the actual law of England, which has been termed a feudal idea, grafted on Roman jurisprudence. The precise nature of it, is no where, perhaps, better explained, than in lord Stair's Institutes. "It is," says his lordship, "essential to a fee, and common to all kinds thereof, that there must remain a right in the superior, which is called *Dominium directum*, and withal a right in the vassal, called *Dominium utile*; the reason of this distinction, and terms thereof, is, because it can hardly be determined, that the right of property is either in the superior or vassal alone, so that the other should only have a servitude upon it; though some have thought superiority but a servitude, to wit, the perpetual use and fruit; yet the conciliation and satisfaction of both have been well found out in this distinction, whereby neither's interest is called a servitude; but by the resemblance of this distinction in law between *jura et actiones directæ*, and those, which for resemblance, were reductive thereto, and therefore called *utiles*, the superior's right is called *Dominium directum*, and the vassal's *Dominium utile*, and without these the right cannot consist." This right in the vassal to the use and profits of the land, while the direct dominion of the land remained in the lord, was, with respect to the relation

between the sovereign and the subject, a new and original point of connection, and one of those marks which distinguish the feudal from every other law.

2. Another of these marks, is, that *immovable or real property only, was admitted to be held in feudality, or in other words, to be the substance of a fee*. Wherever the conquerors, we speak of, established themselves, they seized whatever they desired of the property of the conquered, and the General allotted it to the superior officers of the army, and these again divided it, in smaller parcels, among the inferior officers. The moveable, as well as the immovable property of the conquered, was seised and divided by the conquerors; but moveable property, from its fluctuating and perishable nature, was ill calculated to serve, either as the sign, or the subject, of a permanent connection. This was particularly the case in those days, when it had in no point of view acquired, or was considered susceptible of those artificial modifications, or other durable qualities, in the intendment of law, which it now possesses. Land, therefore, or immovable property, alone, became the subject of feudal tenure. As the notions of men respecting property increased, the modifications of it were also multiplied, and all of them were considered as susceptible of feudality. Thus every species of right or servitude, to which land is subject, was given in fee. At an early period of the feudal law, we find mention of fiefs *de camera* and *cavena*. The former was a pension granted by the lord to be paid out of his treasury; the latter was a quantity of corn, or other grain, granted by the lord, to be delivered out of his granary. In progress of time, money charged upon land was, in some countries, held to be feudal; and even mere money was, at last, in

some countries, held by the feudal obligation, and treated as a fief. Whether money thus held, be, strictly speaking, a fief, has been the subject of much discussion. Thomasius, whose writings, in the course of this inquiry, have been found highly valuable, treats a pecuniary feud as a chimera, and seems inclined to doubt its existence. Sir Thomas Craig thus expresses himself on this question: "The *dominium directum* of a fief must necessarily remain in the lord; the *dominium utile* must necessarily be granted to the feudatory. When the *dominium utile* of a moveable is granted, the profits of it must necessarily belong to the usufructuary. But the profits of a moveable proceed from the use which is made of it. Now the use which is made of a moveable, either consumes it or not. In the first case, the fief is necessarily extinguished; for it is impossible that a moveable in continual use should not, by that very use of it, be consumed, and the lord thereby deprived of it, without any fault on his part, against his will, and even without his knowledge. But if the moveable be not consumed by use, but may be preserved, the vassal has no profit from it. I know many writers of great authority hold, that there may be a fief of moveables, by way of analogy to an usufruct of those things which are consumed by use, where the fruit and the profits belong to the vassal, the propriety remains with the lord. But in this case, the propriety (to use the expression), is not of the individual thing, but of a thing of the same genus or species. And therefore Cujas justly observes, that, properly speaking, these are not fiefs. For natural reason cannot be altered by civil power. We are therefore of opinion, that there cannot be a fief, though there may be a *quasi* fief of a moveable. But even a *quasi* fief is not allowed

by the law of Scotland. For though stipulations are frequent amongst us, that, for the use of money, a certain yearly sum, or a certain quantity of grain be allowed, yet this should not be honoured with the name of fief, as he to whom the payment is to be made, can never be said to die seized of the fee of that money." But at the first establishment of fiefs, land or immovable property, in the narrowest sense of that word, was the subject of a fief. That this species of property, to the utter exclusion of every species of moveables, should be a point of connection between the sovereign and the subject, is another distinctive mark of feudality. To this it is owing, that while in this country, and in every other country, whose jurisprudence is of a feudal extraction, the difference between real and personal, or immovable and moveable property, is so strongly marked, and the legal qualities and incidents of the two species of property, are, in so many important consequences, utterly dissimilar, the distinction between them in the civil law, except in the term of prescription, is seldom discoverable.

3. The remaining point of difference between the feudal polity and the polity of other states is, the *nature of the relation between the chief and the vassals*. This is particularly distinguishable by six circumstances: 1stly, The relation between them was purely of a military nature; 2dly, Behind the sovereign and his immediate feudatories there followed a numerous train of arrere vassals, or sub-feudatories, between whom and the first or immediate feudatory there subsisted a relation nearly similar to that between him and the first or chief lord; 3dly, This relation was territorial, and was not considered to arise from the general allegiance due from a subject to a sovereign, but from an implied obligation

supposed to be annexed to the tenure of the fee; 4thly, The right of administering justice was an appendage of this military relation, and originally commensurate to it in its territorial extent; 5thly, The lord was not allowed to alien the fee without the tenant's consent, nor the tenant, without the consent of his lord; and 6thly, Though in point of dignity, of rank, and of honour, the lord, according to the ideas of those times, enjoyed a splendid pre-eminence over his vassals, his power over them was, comparatively speaking, extremely small. Thus, therefore, the supposed preservation of the *dominium directum*, or real ownership, to the lord, after he had parted with the beneficial ownership, or *dominium utile*, to the tenant; the exclusion of moveable property, from serving either as the sign or the subject of the relation between the sovereign and the feudatory; and the military nature of this relation, including in it the other circumstances before noticed, should be considered as three principal points which distinguish the law of feuds from every other law. To these the book of fiefs, and Cujas, and after them sir Henry Spelman, add the hereditary nature of fiefs; and it is observable, that Littleton, in his explanation of the word *fee*, says it is the same as an inheritance, without adverting to any other quality of a fief. But, as fiefs were not allowed to go in a course of descent, till after a considerable period of time, from their first introduction, and, as they might always be granted for a less estate, than an estate of inheritance, there seems to be no reason to suppose this descendible quality is essential to their nature. We have, therefore, omitted it.

Besides these, (which may be considered as the *essentials* of a fief,) there are qualities, which every fief

should possess, to answer the notions originally entertained of this species of property. Thus, fiefs should be granted without price; to persons duly qualified; and the service should not be fixed to any particular mode or time of service. A fief possessing the essential and secondary qualities, we have noticed, was considered to be a *proper* fief. The absence of any of the qualities, reckoned essential, necessarily precluded the feudal tenure. But any, or all of the qualities reckoned merely proper, might be dispensed with, at the discretion of the parties, without precluding the tenure, according to the maxim, *Modus et conventio vincunt legem*. This introduced the distinction between proper and improper fiefs. But, wherever the feudal tenure was admitted, the fief was presumed to be a proper fief, till the contrary was shown, and it could only be shown by referring to the original investiture. Thence the maxim, in these cases, *Tenor investitura est inspiciendus*.

SECTION 3. LIVERY OF SEISIN.

The character and importance of livery of seisin in the feudal system of land ownership has been thus described by a recent author: "It is absolutely essential—if we leave out of account certain exceptions that are rather apparent than real—that there should be a livery of seisin. The doner and the donee in person or by attorney must come upon the land. There the words of gift will be said or the charter, if there be one, will be read. It is usual, though perhaps not necessary, that there should be some further ceremony. If the subject of gift be a house, the donor will put the hasp or ring of the door into the donee's hand (*tradere per haspam vel annulum*); if there be no house, a rod will be transferred (*trudere per fustem*)

et baculum) or perhaps a glove. Such is the common and the safe practice; but it is not indispensable that the parties should actually stand on the land that is to be given. If the land was within their view when the ceremony was performed, and if the feoffee made an actual entry on it while the feoffor was yet alive, this was a sufficient feoffment. But a livery of seisin either on the land or within the view was necessary. Until such livery had taken place there was no gift; there was nothing but an imperfect attempt to give. We may for purposes of analysis distinguish, as Bracton does, the *donatio* from the *traditio* the feoffment from the livery, the declaration of the donor's will from the induction of the donee into seisin; but in law the former is simply nothing until it has been followed by the latter. The *donatio* by itself will not entitle the donee to take seisin; if he does so, he will be guilty of disseising the donor. Nor does the *donatio* by itself create even a contractual right and bind the donor to deliver seisin. The charter of feoffment, which professedly witnesses a completed gift, will not be read as an agreement to give. Until there has been livery, the feoffee, if such we may call him, had not even *ius ad rem*. Furthermore, the courts of Bracton's day are insisting with rigorous severity that the livery of seisin shall be no sham. Really and truly the feoffor must quit possession; really and truly the feoffee must acquire possession. No charter, no receipt of homage, no transference of symbolic rods or knives, no renunciation in the local courts, no ceremony before the high altar, can possibly dispense with this, for it is the essence of the whole matter—there must be in very truth a change of possession, and rash is the feoffee who allows his feoffor's chattels to remain upon the

land or who allows the feoffor to come back into the house, even as a guest, while the feoffment is yet new.

“We are told that at a yet remote time this elaborate ‘mode of assurance’ began to dissolve into its component parts, some of which could be transacted away from the land. It is not always very convenient for the parties to visit the land. In particular is this the case when one of them is a dead saint. One may indeed, if need be, carry the reliquary that contains him to the field that he is to acquire; but some risk will thus be run; and if the saint cannot come to the field, the field must come to the saint. In miniature it can do so, turf and twig can be brought from it and placed with the knife upon the shrine; the twig can be planted in the convent garden. And then it strikes us that one turf is very much like another, and since the bishop, who has just preached a soul-stirring sermon, would like to secure the bounties of the faithful while compunction is still at work, a sod from the church-yard will do, or a knife without any sod, or a glove, or indeed any small thing that lies handy, for the symbolical significance of sods and knives and gloves is becoming obscure, and the thing thus deposited is now being thought of as a gage or wed (*vadium*) by which the donor can be constrained to deliver possession of the land. When, under Roman influence, the written document comes into use, this also can be treated as a symbol; it is delivered in the name of the land; the effectual act is not the signing and sealing, but the delivery of the deed, and the parchment can be regarded as being as good a representative of land as a knife or a glove would be. Just as of old the sod was taken up from the ground in order that it might be delivered, so now the charter is laid on the ground

and thence it is solemnly lifted up or 'levied' (*levatio cartae*). Englishmen hereafter will know how to 'levy a fine.' And lastly, there are, as we shall see hereafter, advantages to be gained by a conveyance made before a court of law after some simulated litigation; and one part of the original ceremony can be performed there; the donor or vendor can, in court, go through the solemnity of surrendering or renouncing the land; the rod or *festuca* can be passed from hand to hand in witness of this surrender." ²

SECTION 4. SCOPE OF THIS SUBJECT.

Following out the plan in this work of avoiding repetition, in the treatment of the subject of real property, many topics generally treated under this title have been passed over with a mere reference. The practical questions relative to conveyancing and the examination of abstracts will be found discussed in the succeeding subject of Abstracts in this volume. Equitable estates have been reserved for treatment under the subject of Equity Jurisprudence ³ and Trusts. ⁴ Testamentary estates are treated under the subject of Wills. ⁵

The present article has been mainly devoted to the historical definition of the law of real property, and the treatment of the various kinds of estates and titles.

SECTION 5. AUTHORITIES.

The subject of real property is one of the oldest branches of the law, and had become fully developed before the birth of some other branches of the law which have attained prominence at the present time.

² Pollock & Maitland, pages 82 to 84 and 85 to 86.

³ Vol. 7, Subject 20.

⁴ Vol. 7, Subject 21.

⁵ Vol. 10 Subject 32.

On many topics under this subject, little development or addition has been made to the law for several centuries. This is particularly true of the subject of the creation and classification of estates.

The two writers upon whose works all subsequent works of real property have been mainly based were Thomas Littleton and Sir Edward Coke. On account of the important places occupied by these writers in the field of real property, references have in the main been made to these writings from which a number of quotations have been taken.

“Littleton was a judge of the common pleas in the reign of Edward IV, and composed his book of Tenures for the use of his son, to whom it is addressed. It contains three books; the first upon estates; the second upon tenures and services, which two were designed to explain more at large the principal subject of the old book of tenures; the third discourses of several incidents and consequences of tenures and estates. This little treatise has acquired more notice than any other book in the law; which is to be ascribed partly to the nature of the subject, partly to the manner in which it is treated, and partly to the great character of the writer when a judge.

“The learning of real property had in the reign of Edward III been cultivated with a minute attention; the period which had elapsed from that reign to the time when our author wrote, had produced many additions and modifications of it, till this branch had grown into a very refined system, constituting, in every respect, the most intricate part of our jurisprudence. These later determinations had rendered the old treatises of the law in a great degree obsolete. Bracton, though more full than any of the rest, being more

ancient, afforded no light in that sort of questions which were now usually canvassed and many of which had originated entirely since his time; still less was to be expected from Fleta, Britton, and The Mirror, though of a later age. In this state of things, it was an undertaking much to be wished, that some one should explain in a methodical way the new learning that had arisen on the subject of tenures and estates. This our author has done, with a felicity which has placed him in a rank above all writers on the English law.

“If we inquire what is the excellence which has entitled this writer to so high a character, it will be found to be a particular kind. It is not an accurate arrangement of his subject; not a remarkably apt division of his matter; not a strict adherence even to his own plan, by preserving a close connection between the matter and title of a chapter; in all which he is sometimes more defective than writers of inferior note; the excellence of Littleton seems to consist in the great depth of his learning and simplicity of his manner; in a comprehensive way of thinking, and a happy method of explaining; with a certain plainness, yet significance of style that is always clear and expressive.

“This author usually quotes no authority for what he advances. In this, however, he does not differ much from his contemporaries, who, even in their arguments and opinions delivered in court, had not got into that practice of vouching authorities which has obtained so much since. Whenever he has a point to handle which is not thoroughly settled, he generally states the different opinions on it, and then gives his own reasons for differing or agreeing with either; and where he does not deliver an opinion declaredly

his own, the last is supposed to be that which he is inclined to adopt. This open and candid way of discussing, added to the known abilities of the author acquired him great confidence with posterity; anything out of Littleton has been usually taken upon that authority alone. Thus, the want of references, which at first might seem a want of authenticity, has in the end administered to the fame of this writer; as opinions which otherwise might be vouched from an adjudged case are now wholly rested on the words of Littleton.

“The undiminished reputation which this author still possesses is owing principally to the choice of his subject. The law of tenures and estates, as understood in the time of Littleton, is at this day the best introduction to the knowledge of real property; and though great part of this volume is not now law, yet so intimately was the whole of that system connected that what remains of tenures cannot be understood without a knowledge of what is abolished; and therefore the parts of Littleton which are now obsolete, are studied both with profit and pleasure. We may still say what the author pronounced of his work in another respect: ‘Though certain things which are moved and specified in the said book are not altogether law, yet such things shall make them more apt and able to understand and apprehend the arguments and reasons of the law.

“Besides this, the law of tenures and estates has always been thought the most natural entrance into the study of the law in general; this small volume, therefore, became the first book which was put into the hands of the student; and while it was considered by practisers and the court as a work of the highest authority, it was at the same time the introduction

to English jurisprudence. Lawyers gave their earliest and latest application to the text of Littleton; every section and sentence was weighed, and every proposition considered in all its consequences; it was translated, commented, analyzed; every method was contrived to gain a complete knowledge of its contents. Perhaps no book, in any science so confined as the municipal laws of any country may be, has more employed the labors of the learned and industrious. A writer, who was himself one of the greatest ornaments of the law, and whose name never appears greater than when accompanied with that of our author, furnished the world with a very copious and minute commentary on this book; in which he has carried his attention to the import of every word so far as to make interesting remarks on his very *et caeteras*. The fame of Littleton has not been confined to this island. As the Norman lawyers made Glanville a model upon which to form their *coustumier*, and give system to their jurisprudence, a modern writer of that country has lately composed a comment on Littleton, as the best help towards illustrating the customs and laws of that duchy.”⁶

Sir Edward Coke, the great commentator upon the work of Littleton was Chief Justice of England during the early part of the seventeenth century and a leader of the popular party in the later parliament in the reign of James I. He was, in addition, one of the greatest of English law writers, his chief works being his reports which covered the period from 1600 to 1616, and his Institute written in four parts, the first of which included his commentaries on the work of Littleton.

⁶ Reeves' History of English Law, pages 153 to 156.

On matters of a more modern character, the work generally referred to has been that of Warvelle on Real Property.

SECTION 6. OWNERSHIP, POSSESSION AND ENJOYMENT.

The various rights in real estate are included under the three expressions, ownership, possession and enjoyment. The idea conveyed by each of these three terms is well expressed by the following extracts from one of the latest works on this subject:

“In our example the student will not fail to have observed a basic idea which pervaded every part and colored every phase, and this idea or notion, may be crystallized into the word ownership. The expression is convenient; it represents the ideas involved in the sum of the aggregations of rights which may be had in land better than any other word that can be used, yet it is merely an abstraction. It eludes exact and scientific definition, and legal lexicographers admit their inability to fix its precise status. It has been described by one writer as ‘the relation of a person to a thing,’ by another as ‘a plenary control over an object,’ by another as the ‘entirety of the powers of use and disposal allowed by law,’ and by still another as ‘a right over a determinate thing, indefinite in point of use, unrestricted in point of disposition, and unlimited in point of duration.’ Perhaps the best definition is that which describes it as ‘a power residing in the land owner as its subject exercised over the land, as its object, and available against all other men.’ None of these descriptions are altogether satisfactory, particularly when applied to the ownership of land, and we are compelled to seek a definition rather in the enumeration of its attributes than in the term itself. But in spite of our inability to strictly define the term,

it yet definitely represents fixed ideas of property. It implies powers of use and disposal; it carries with it the idea of possession, it indicates rights of enjoyment, and further indicates that all of these rights are exclusive of corresponding rights in others. But the power of user may be qualified in many ways; the power of disposal may be limited; one may be the owner and yet not entitled to possession; and the rights of enjoyment may be abridged or suspended.”⁷

“From the same example we may gather another idea which finds expression in the term possession. This also is a legal abstraction, in no way dependent on physical conditions, control or detention, notwithstanding that we are accustomed to associate it with some one or all of these phases. Possession is generally regarded as an attribute of ownership—in fact, that it is inherent in ownership. We have seen, however, that a person may be the owner and yet not be entitled to possession, while, on the other hand, a person may be in possession who is not the owner. This enables us to draw a strong line of demarcation between ownership and possession, although the two are often confounded.”⁸

“There is still another idea involved in our example which is quite adequately expressed in the word enjoyment. This also is an attribute of ownership and is inseparably connected with possession, yet it represents ideas which neither of those terms fully cover. A grant is made to a party of lands which he is to ‘have (own), possess, and enjoy,’ and these three terms seem to express in all its fullness the sum of the aggregate of proprietary rights.”⁹

Warvelle on Real Property, pages
15-16.

⁸ Warvelle on Real Property, page
17.

⁹ Warvelle on Real Property, page
20.

SECTION 7. LAND.

Real property is said to include land, tenements, and hereditaments.

“Terra, land, in the legal signification, comprehendeth any ground, soil, or earth whatsoever; as meadows, pastures, woods, moors, waters, marshes, furses, and heath. *Terra est nomen generalissimum omnes species terrae*; but properly *terra dicitur a terendo, quia vomere teritur*; and anciently it was written with a single r; and in that sense it included whatsoever may be ploughed; and is all one with *arvum ab arando*. It legally includeth also all castles, houses, and other buildings, for castles, houses, etc., consist upon two things, viz., land or ground as the foundation or structure thereupon; so as passing the land or ground, the structure or building thereupon passeth therewith. Land is anciently called *fieth*; but land builded is more worthy than other land, because it is for the habitation of man, and in that respect hath the precedency to be demanded in the first place in a *praecipe*, as hereafter shall be said. And therefore this element of the earth is preferred before the other elements, neither in the water, air or fire. For as the heavens are the habitation of Almighty God, so the earth hath he appointed as the suburbs of heaven to be the habitation of man; *caelum caeli domino, terram autem dedit filiis hominum*; all the whole heavens are the Lord’s, the earth hath he given to the children of men. Besides, everything as it serveth more immediately, or more merely for the food and use of man (as shall be said hereafter), hath the precedent dignity before any other. And this doth the earth; for out of the earth cometh man’s food and bread that strengthens man’s heart, *confirmat cor*

hominis, and wine that gladdeth the heart of man and oil that makes him a cheerful countenance; and therefore *terra olim Ops mater dicta est, quia omnia hae opus habent ad vivendum* And the divine agreeth, herewith; for he saith, *patriam tibi et nutricem, et matrem, et mensam, et domum posuit terram Deus, sed et sepulchrum tibi hanc eandem dedit*. Also, the waters that yield fish for the food and sustenance of man, are not by that name demandable in a *praecipe*; but the land whereupon the water floweth or standeth is demandable; as for example, *viginti acras terrae aqua coopertas*; and besides, the earth doth furnish man with many other necessities for his use, as it is replenished with hidden treasures, namely, with gold, silver, brass, iron, tin, lead, and other metals, and also with great variety of precious stones, and many other things for profit, ornament and pleasure. And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of air and all other things, even up to heaven, for *cujus est solum est usque ad caelum*, as is holden, 14 H., 8 fo 12; 22 H., 6, 58; 10; 3; 4; 14. *Registrum* origin and in other books.”¹⁰

SECTION 8. TENEMENTS.

Tenements is a larger term than land and includes everything which might be holden under the Feudal system.

“*Tenementum*, tenement, is a large word to pass not only lands and other inheritances which are holden, but also offices, rents, commons, profits apprender out of lands, and the like, wherein a man hath any frank-

¹⁰ Coke's Institute, Vol. I, pages 197-198.

tenement, and whereof he is seised, *ut de libero tenemento.*" ¹¹

SECTION 9. HEREDITAMENTS.

"But *haereditamentum*, hereditament, is the largest word of all in that kind; for whatsoever may be inherited is an hereditament, be it corporeal or incorporeal, real or personal or mixt." ¹²

"An heirloom, though neither land nor tenement, but a mere moveable, yet being inheritable, is comprised under the general word, 'hereditament' and a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament." ¹³

Hereditaments are divided into corporeal and incorporeal hereditaments. Most authors on real property state the distinction between corporeal and incorporeal hereditaments to be that the former is the thing itself and the latter only some interest in it. This view is however, entirely erroneous, as hereditaments of either class, are merely interests in the land.

SECTION 10. INCORPOREAL HEREDITAMENTS.

The true distinction between corporeal and incorporeal hereditaments has been quoted as follows:

'While the term 'incorporeal' is still employed to designate certain kinds of real property of an invisible or intangible nature, yet its original and early significance has wholly disappeared. The test or distinction between corporeal and incorporeal property, as these terms were used at common law, lay in the fact of susceptibility of actual delivery, and such things as were incapable of same, because of their intangible nature, were denominated incorporeal. Being inca-

¹¹ Coke's Institutes, Vol. I, page 219.

¹² Id.

¹³ Id.

pable of an actual delivery, they could be transferred or conveyed only by grant or deed; hence incorporeal property was said to lie in grant, while corporeal property, or such as admitted of some manual and visible act of delivery, was said to lie in livery."¹⁴

The ten important species of incorporeal hereditaments at common law were as follows: advowsons, tithes, commons, ways, offices, dignities, corodies, annuities, franchises, and rents.

The only incorporeal hereditament recognized in this country at the present time, is that of right of way.

SECTION 11. EASEMENTS.

An easement is sometimes classified as an incorporeal hereditament, but at other times it is a mere license.

An easement is a right in favor of some person of property imposed upon another piece of property. The land to which the right is attached is called the dominant tenement and that in which it exists is called the servient tenement. Easements themselves are classified as appurtenant and in gross. The former are attached to a certain part of land and passed with it. The latter belong to some individual and are not assignable.

Easements are also classified as affirmative and negative. An affirmative easement is one which allows the owner of the dominant tenement to do some act on the servient tenement, as to cross over it, in the case of a right of way. A negative easement is one which prohibits the owner of a servient tenement from doing a certain thing on or in relation to his land. An illustration of this would be where a land owner was

¹⁴ Warvelle on Real Property, page 50

prohibited from building on a certain portion of his land for the benefit of the adjacent land-owner.

SECTION 12. FIXTURES.

The term "fixtures" is one of doubtful meaning, being used in different works and decisions in a diametrically opposite significance. Applied in the former sense is to apply the terms trade, agricultural and domestic fixtures to those fixtures which may be severed from the land contrary to the general rule. Ordinarily, however, personal property is annexed to the land in a substantial and permanent manner and becomes itself, real property. Also what is known as constructive annexation which exists in the case of those articles which are not fastened to the realty themselves are made for the purpose of being used in connection with property so annexed. Keys and blinds would furnish illustrations of constructive annexation.

The law makes exceptions to the general rule governing annexation in the case of property annexed to the realty by the person rightfully in possession, but not the owner, for trade in domestic or agricultural purposes. Such can be removed, provided such removals will not inflict substantial injury upon the property, and provided also, that the property is severed from the realty before the termination.

SECTION 13. EMBLEMENTS.

Emblements is the rights which the owner of an estate of uncertain duration has in crops which were planted but not harvested, at the time of the termination of the estate. Emblements do not exist in favor

of the holder of an estate for a certain period as in such a case the termination of the estate could have been foreseen and the tenant had no right to plant the crops.

SECTION 14. ESTATES AND TITLES.

The greater part of this subject is taken up with the treatment of the various species of estate and titles in real property. It is important at the outset to clearly understand the distinction between the meaning of these two terms.

An estate is the interest which a person holds in land, while a title is the method by which such interests is acquired or the authority for holding it. Chapters II to V are taken up with subject of estates, while chapter VI is devoted to that of Titles.

CHAPTER II.

ESTATES CLASSIFIED AS TO QUANTITY.

SECTION 15. CLASSIFICATION.

Estates as to their quantity are first divided into freeholds and less than freeholds. Freeholds are subdivided into estates of inheritance and freeholds less than inheritance. Freeholds of inheritance include estates of fee-simple and fee-tail. Freeholds less than inheritance include the various kinds of life estates. Estates less than inheritance are subdivided into estates for years, estates at will, estates from year to year and estates at sufferance.¹

SECTION 16. FREEHOLDS.

“Freeholds, or estates of indeterminate duration, are in turn divided into estates of inheritance or in fee, and estates not of inheritance, or for life. The former being, where the interest devolves upon successors without end, i. e., when there is no assignable event, certain to happen, upon which the rights will come to an end; the latter is where the interest does not devolve and the rights terminate on the happening of an assignable but uncertain event. At Common Law the former was subject to a further division into absolute and limited estates of inheritance, but this distinction has been abolished in the United States, although a very faint resemblance yet exists in some states.²

¹ See Appendix A to Real Property for Charts showing the classification of estates.

² Warvelle on Real Property, p. 69.

SECTION 17. ESTATES OF INHERITANCE.

Estates of inheritance are those estates which upon the death of the holder, still continue and descend to his heirs. Estates of inheritance are divided into estates in fee-simple and estates in fee-tail.

SECTION 18. FEE-SIMPLE.

The ancient and the modern character of the estate in fee-simple are described in the following two quotations, one from a seventeenth and the other from a twentieth century legal writer.

“FEE cometh of the French fief, (*i. e.*), *praedium beneficiarium*, and legally signifieth inheritance, as our author himself expoundeth it. And simple is added, for that it is descendible to his heirs generally, that is, simply, without restraint to the heirs of his body, or the like. *Feodum est quod quis tenet ex quacunque causa, sive sit tenementum sive redditus*, etc. In Domesday it is called *feodum*. Of fee-simple, it is commonly holden, that there be three kinds, viz., fee-simple absolute, fee-simple conditional, and fee-simple qualified, or a base fee. But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, viz., simple or absolute conditional, and qualified or base. For this word (simple) properly excludeth both conditions and limitations, that defeat or abridge the fee. Hereby it appeareth that fee, in our legal understanding, signifieth, that the land belongs to us and our heirs, in respect whereof the owner is said to be seised in fee; and in this sense the king is said to be seised in fee.”³

“As used in the United States the term signifies an absolute estate of inheritance, free from any restrictions

³ Coke's Institutes, Vol. I, p. 490.

to particular heirs, and is the largest estate and most general interest that can be enjoyed in land, being the entire property therein. It carries with it the most ample right to the use of the land and confers an unlimited power of alienation. In point of duration it may continue forever. Every other species of estate is formed out of it and is ultimately absorbed into it.”⁴

Formerly an estate in fee-simple could only be created by the use of the word “heirs.” This rule was so absolute that even such a grant as “A, his descendants or assigns forever,” would only create a life estate.

“For if a man would purchase lands and tenements in fee-simple, it behooveth him to have these words in his purchase, To have and to hold to him and his heirs. (‘To have and to hold:’ These two words do in this place prove a double signification, viz., to have, to have an estate of inheritance of lands descendible to his heirs, and to hold, to hold the same of some superior lord). For these words (his heirs) make the estate of inheritance. For if a man purchase lands by the words, To have and to hold to him and his assigns forever; (assignee cometh of the verb assigno; and note, there be assigns in deed and assigns in law; whereof see more in the Chapter of Warranty, Section 733), in these two cases he hath but an estate for term of life, for that there lack these words, (his heirs), which words only make an estate of inheritance in all feoffments and grants.”⁵

“And it is to be observed, that every word of Littleton is worthy of observation. First, heirs in the plural number; for, if a man give land to a man and to his heir in the singular number, he hath but an estate

⁴ Warvelle on Real Property, p. 70.

⁵ Littleton, Sec. 1.

for life, for his heir cannot take a fee-simple by descent, because he is but one, and therefore in that case his heirs shall take nothing. Also observable is this conjunctive (et). For if a man give lands to one, To have and to hold to him or his heirs, he hath but an estate for life, for the uncertainty. (His, suis). If a man give land unto two, To have and to hold them two et haeredibus, omitting suis, they have but an estate for life, for the uncertainty; whereof more hereafter in this section. But it is said, if land be given to one man et haeredibus, omitting suis, that notwithstanding a fee-simple passeth; but it is safe to follow Littleton.”⁶

SECTION 19. ESTATES IN FEE-TAIL.

Estates in fee-tail “are the second class of estates of inheritance. An estate in fee-tail differed from an estate in fee-simple in that while the latter was a grant to a person and his heirs generally, the former was a grant to a person and the heirs of his body; *i. e.*, his direct descendants. Upon the death of a person holding an estate in fee-tail the property could only go to those relations of his (otherwise qualified), who were lineal descendants of the first holder of the estate tail. If there were no persons with these requirements the land reverted to the original grantor or his heirs.

The estate of fee-tail was created to enable land to be kept in the same family, and to prevent its alienation.⁷ The Statute which created the estate (and at the same time abolished the fee conditional) was known as the Statute of DeDonis, and was the thirteenth chapter of the Statutes of Westminster II, 12 Edward I (1285).⁸

⁶ Coke's Institutes, Vol. I, p. 494.

⁷ For the long contest in English legal history over the right of alienation of land, see Appendix A to Real Property.

⁸ “The statute of W. 2.” This statute was made in 13 E., 1, and is called West. 2, because the Parliament was holden at Westminster, and hath the

Estates in fee-tail are divided into those in fee-tail general and fee-tail special. The former were those estates limited to all the descendants of the grantee, and the latter those limited to the descendants of the grantee by a particular person. Thus a grant to "A and the heirs of his body" created a fee-tail general, while a grant to "A and the heirs of his body by his wife B" created a fee-tail special. Estates in fee-tail could also be limited either to the male or to the female heirs of the grantee. Such estates were called estates in fee-tail, male or fee-tail female.

Estates in fee-tail have been abolished in nearly all the States of this country. They still exist in a few states in a modified form. Thus in Illinois an estate in fee-tail may still be created but in such a case, while the grantee takes only a life estate, his children take an estate in fee-simple.

The remainder of this section is composed of extracts from Coke on Littleton.⁹

"In gifts in tail these words (heirs) are as necessary as in feoffments and grants; for seeing every estate tail was a fee-simple at the common law, and at the common law no fee-simple could be in feoffments and grants without these words, (heirs) and that an estate in fee-

name of the second, because another Parliament was formerly holden at Westminster in the third year of the same king's reign, which was called Westminster the first. And albeit, many Parliaments were after holden at Westminster besides these, yet were they two only, *propter excellentiam*, called the statutes of Westminster. And the act intended by Littleton is W. 2, cap. 1, upon which statute our author, in the Inner Temple, did learnedly read, whose reading I have. Of King Edw. I, and of this

statute, Sir William Herle, Chief Justice of the Court of Common Pleas, in 5 E., 3, 14, saith, that King E. I, was the wisest king that ever was; and the cause of the making of this statute, was to preserve the inheritance in the blood of them to whom the gift was made. And in 9 E., 3, 22, he saith, that they were sage men that made this statute. See more of this in the Chapter of Warranties, Sec. 746. Coke's Institutes.

⁹ See Section 5.

tail is but a cut or restrained fee, it followeth, that in gifts in a man's life-time no estate can be created without these words, (heirs) unless it be in case of frank-marriage, as hereafter shall be shown. And where Littleton saith, (heirs) yet (heir) in the singular number in a special case may create an estate tail, as it appeareth by 39 Ass. p. 20, hereafter mentioned. And yet if a man give lands to A. et haeredibus de corpore suo, the remainder to B. in forma praedicta, this is a good estate tail to B., for that in forma praedicta do include the other. If a man letteth lands to A. for life, the remainder to B in tail, the remainder to C. in forma praedicta, this remainder is void for the uncertainty. But if the remainder had been, the remainder to C. in eadem forma, this had been a good estate tail; for idem semper proximo antecedenti refertur. If a man give lands and tenements to a man et semini suo, or exitibus vel prolibus de corpore suo, to a man and to his seed, or to the issue or children of his body, he hath an estate for life; for albeit that the statute provideth, that voluntas donatoris secundum formam in charta doni sui manifeste expressam de caetero observetur, yet that will and intent must agree with the rules of law. And of this opinion was our author himself, as it appeared in his learned reading afore-mentioned upon this statute, where he holdeth if a man giveth land to a man et exitibus de corpore suo legitime procreatis, or semini suo, he hath but an estate for life, for that there wanteth words of inheritance.

"These words, 'of his body,' are not so strictly required but that they may be expressed by words that amount to as much: for the example that the statute of W. 2, putteth hath not these words, (de corpore) but these words (haeredibus) viz., Cumaliquis dat terram

suam alicui viro et muliere procreatis. If lands be given to B. et haeredibus quos idem B. de prima uxore sua legitime precrearet, this is a good estate in special tail, (albeit he hath no wife at that time), without these words (de corpore). So it is if lands be given to a man, and to his heirs which he shall beget of his wife, or to a man et haeredibus de carne sua, or to a man et haeredibus de se. In all these cases these be good estates in tail, and yet these words (de corpore) are omitted."

"Two things seem essential to an intail within the statute De donis. One requisite is, that the subject be land or some other thing of a real nature. The other requisite is, that the estate in it be an inheritance. Therefore, neither estates pur auter vie in lands, though limited to the grantee and his heirs during the life of cestui que vie, nor terms of years, are inalienable any more than personal chattels; because as the latter, not being either interests in things real or of inheritance, want both requisites; so the two former, though interests in things real, yet not being also of inheritance, are deficient in one requisite. However, estates pur auter vie, terms for years, and personal chattels, may be so settled, as to answer the purposes of an intail, and be rendered unalienable almost for as long a time, as if they were intailable in the strict sense of the word. Thus estates pur auter vie may be devised or limited in strict settlement by way of remainder like estates of inheritance; and such as have interests in the nature of estates intail may bar their issue and all remainders over by alienation of the estate pur auter vie, as those, who are, strictly speaking, tenants intail, may do by fine and recovery; but then the having of issue is not an

essential preliminary to the power of alienation in the case of an estate pur auter vie limited to one and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of settling terms for years and personal chattels is different; for in them no remainders can be limited; but they may be intailed by executory devise or by deed of trust; as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being and twenty-one years after, and perhaps in the case of a posthumous child a few months more; a limitation of time, not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar of the intail by fine or recovery for a longer space. It is also proper to observe, that, in the case of terms of years and personal chattels, the vesting of an interest which in reality would be an estate tail, bars the issue and all the subsequent limitations, as effectually as fine and recovery in the case of estates intailable within the statute De donis, or a simple alienation in the case of conditional fees and estates pur auter vie; and further, that if the executory limitations of personalty are on contingencies too remote, the whole property is in the first taker. Upon the whole, by a series of decisions within the last two centuries, and after many struggles in respect to personalty, it is at length settled, that every species of property is in substance equally capable of being settled in the way of intail; and though the modes vary according to the nature of the subject, yet they tend to the same point, and the dura-

tion of the intails is circumscribed almost as nearly within the same limits, as the difference in property will allow. As to the intail of estates pur auter vie, see 2 Vern., 184, 225; 3 P., Wms., 262; 1 Atk., 324; 2 Atk., 259, 376; 3 Atk., 464, and 2 Ves., 681. As to the intail of terms for years and personal chattels, see Manning's Case, 8 Co., 94. Lampett's Case, 10 Co., 46b; Child and Bailey, W. Jo., 15. Duke of Norfolk's Case, 3 Chan. Case 1, a case in Carth., 267, and one in 1 P. Wms., 1. See, also, Fearne's Essay on Conting. Rem. and Exec. Dev., 2d ed., p. 122, to the end. Mr. Fearne's work is so very instructive on the dry and obscure subject of remainders and executory devises, that it cannot be too much recommended to the attention of the diligent student. Note, it was resolved in the 40 Eliz., that the statute De donis doth extend to the Isle of Man; because the statute is general, and the Isle of Man is not specially named. See 4 Inst., 284; 2 And., 115, and 2 Ves., 350. See, also, ante, 9a, where the following note by Lord Hale in respect to the case of the Isle of Man, there mentioned by Lord Coke to have been adjudged in 40 Eliz., should have been introduced; though as it partly relates to the statute De donis, it may come in here without any impropriety. Note, William, Earl of Salisbury, got Man from the Scots, and granted it to William Scroop. Hen. 4, claimed it by conquest from him, granted it to comiti Northumbrae, and on his attainder granted it to Sir John Stanley and his heirs; and in this case ruled. 1. That Man is not a parcel of England. 2. That it is bound by statutes of England where specially named, otherwise not. Therefore, the statutes De donis, of uses, of wills, not in force there; and it descends to the co-heirs of Ferdin-

ando, and not of his brother, William, Earl of Derby. Hall MSS."

"In the same manner it is of the tenant in special tail, &c. For in every gift in tail without more saying, the reversion of the fee simple is in the donor.

"This is wrought by the construction of the statute of W. 2, cap. 1, which hath turned the fee-simple of the donee into a particular estate of inheritance, and the possibility of the donor, to a reversion in him expectant upon the estate tail, so as there be two inheritances of one land; yet this was doubted in our books, and there resolved according to Littleton. But I see no cause wherefore that point should be drawn in question, for at the same session of Parliament (in which the statute *De donis conditionalibus* was made), viz., cs. 3, it is expressly said, *vel per donum in quo reservatur reversio*, so as by the judgment of the same Parliament a reversion was settled in the donor."

"Tenant intail special is, where lands or tenements are given to a man and to his wife, and to the heirs of their two bodies begotten. In this case none shall inherit by force of this gift, but those that be engendered between them two. And it is called tail, because if the wife die, and he taketh another wife and have issue, the issue of the second wife shall not inherit by force of this gift, nor also the issue of the second husband, if the first husband die."

"Tenant in fee-tail after possibility of issue extinct is, where tenements are given to a man and to his wife in special tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. And if they have issue, and the one die, albeit, that during the life of the issue the survivor

shall not be said tenant in tail after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the tail, then the surviving party of the donees is tenant in tail after possibility of issue is extinct.

And note, that none can be tenant in tail after possibility of issue extinct, but one of the donees, or the donee in special tail. For the donee in general tail cannot be said to be a tenant in tail after possibility of issue extinct; because always during his life, he may by possibility have issue, which may inherit by force of the same intail. And so in the same manner the issue, which is heir to the donees in special tail, cannot be tenant in tail after possibility of issue extinct for the reason above said.”

SECTION 20. LIFE ESTATES.

Freeholds less than inheritance are life estates. Life estates are subdivided into legal and conventional life estates. Conventional life estates are those created by the acts of the parties and include estates for the life of the holder and estates for the life of another person. Legal life estates are those created by operation of law and include the estates of coverture, curtesy, dower and homestead.

SECTION 21. CONVENTIONAL LIFE ESTATES.

A conventional life estate is one created by the act of the parties. It may be for the life of the tenant, for the life or lives of others, or for the lives of the tenant and another jointly.¹⁰ The life estate was the

¹⁰ Tenant for term of life is, where a man letteth lands or tenements to another for the terms of the life of the lessee, or for term of the life of another man. In this case the lessee is tenant for term of life. But by common

speech he, which holdeth for term of his own life, is called tenant for term of his life; and he, which holdeth for term of another's life, is called tenant for term of another man's life. Coke's Institutes.

estate originally favored by the common law. No particular words of limitation were required for the creation of a life estate (as in the case of the creation of estates in fee-simple or fee-tail). Where a grant was made to a person without any words of limitation he would be held to take a life estate. The law in this respect has been changed in the United States, where today a grant without any words of limitation will convey a fee-simple (or all the grantor's interest if such interest is less than a fee-simple estate).

The term "life estate" was formerly extended so as to include all freeholds not of inheritance. It, therefore, embraces an estate for an uncertain period which may continue during a life or lives. Such would be a grant to a woman during widowhood.

A peculiar rule of inheritance formerly existed in the case of estates for the life of another, or estates *per anter vie*, as they are called. Such an estate terminates with the death or the *cestui que vie* and does not expire with the death of the tenant. At common law it could not descend to the heirs, for the law of descent applies only to estates of inheritance. It could not pass to the executor or administrator, for they could take only chattel interests, and this estate was a freehold. At common law it was permitted for any one who first took possession to hold such estate, and he was called the general occupant. This right of general occupancy could only be exercised where there were no persons designated in the grant who could take as special occupants. If the grant was to A, and his heirs during the life of B the heirs would take as special occupants, to the exclusion of the general occupant.

This principle has now been done away with, and

such an estate would descend to the heirs of the tenant for life, who could hold it during the lifetime of the party for whose life the estate was limited. The life estate known as the estate tail after possibility of issue is extinct, has been already treated in the section on estates (tail).

SECTION 22. LEGAL LIFE ESTATES.

The four legal life estates are those of coverture, curtesy, dower, and homestead. All of these estates arise by operation of law independent of contract. The first three of these have already been discussed under the subject of Domestic Relations.¹¹

The estate of coverture is now abolished in nearly all the states. The estate of curtesy still exists in some of the states but has been abolished in others. Where the estate of curtesy has been abolished the husband has generally been given the same rights of dower as the wife. Curtesy and dower are now almost entirely regulated by statute. Questions as to these estates are determined according to the laws of the place where the land is situated.

A few extracts from Coke's Commentaries on the subject of curtesy and dower are here inserted:

"Tenant by the curtesy of England (in Latin, *per legem Angliæ*), is where a man taketh a wife seised in fee-simple, or in fee-tail general, or seised as heir in tail special, and hath issue by the same wife, male or female, born alive, albeit, the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesy of England, because this is used in no other realm but in England only."

¹¹ See Volume IV, Subject 10.

“Tenant in dower (*tenens in dote*) is, where a man is seised of certain lands or tenements in fee-simple, fee-tail general, or as heir in special tail, and taketh a wife and dieth; the wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband’s at any time during the coverture; to have and to hold to the same wife in severalty by metes and bounds for term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband (for she must be above nine years old at the time of the decease of her husband); otherwise she shall not be endowed.”¹²

“Dowment *ad ostium ecclesiae* is where a man of full age seised in fee-simple, who shall be married to a woman, and when he cometh to the church door to be married, there, after affiance and troth plighted between them, he endoweth the woman of his whole land, or of the half, or other lesser part thereof, and there openly doth declare the quantity and certainty of the land, which she shall have for her dower. (Here be two things that the law doth delight in, viz., first, to have this and the like openly done; secondly, to have certainty, which is the mother of quiet and repose. And this word (moiety), above said, is to be

¹² The following note is by the editor of the eleventh edition of Lord Coke’s Commentary. (The reason why the law gave the wife dower will appear, if we consider how the law stood anciently; for by the old law, if this provision had not been made, and the party at the marriage had made no assignment of dower, the wife would have been without any provision, for the personal estates

even of the richest were then very inconsiderable; and before trusts were invented, which is but lately, the husband could give his wife nothing during his own life, nor could he provide for her by will, because lands could not be devised, unless it was in some particular places by the custom, till the statute of Hen. 8 (Hargr. n. 8, 30 b., (178).

intended of the half in certainty, and not of the moiety in common; which clearly appeareth in that here Littleton saith, the quantity and certainty of the land.) In this case the wife, after the death of the husband, may enter into the said quantity of land of which her husband endowed her, without other assignment of any."

"Dowment *ex assensu patris* is, where the father is seised of tenements in fee, and his son and heir apparent when he is married, endoweth his wife at the monastery or church door, of parcel of his father's lands or tenements, with the assent of his father, and assigns the quantity and parcels. (So as both in dower *ad ostium ecclesiae, et ex assensu patris*, the certainty must be expressed. And therefore, where books speak of a moiety, it is intended, (as hath been said), of a half in certain.) In this case, after the death of the son, the wife shall enter into some parcel, without the assignment of any. (In this case, after the death of the husband, the wife shall enter, or have a writ of dower, albeit, the father be alive.) But it hath been said in this case, that it behooveth the wife to have a deed of the father, to prove his assent and consent to this endowment. M. 44, E. 3, s. 45."

"Also, there is another dower, which is called dowment *de la plus beale*. And this is in case where a man is seised of forty acres of land, and he holdeth twenty acres of the said forty acres, of one by knight-service, and the other twenty acres in socage, and taketh wife, and hath issue a son, and dieth, his son being within the age of fourteen years, and the lord of whom the land is holden by knight-service entereth into twenty acres holden of him, (for he is not possessed as a guardian against whom a writ of dower

lieth, until he doth enter. Of the wardship of the body he is possessed before seisure, because it is transitory, but he is not possessed of the land until he enter, because it is permanent. And therefore, if he doth not enter, the heir within age may assign dower, (as hath been said, and as it appeareth afterwards,) and holdeth them as guardian in chivalry during the nonage of the infant, and the mother of the infant entereth into the residue, and occupieth it as guardian against the guardian in chivalry, to be endowed of the tenements holden by knight-service, in the King's court, or other court, the guardian in chivalry may plead in such case all this matter, and show how the wife is guardian in socage as aforesaid; and pray that it may be adjudged by the court, that the wife may endow herself *de la plus beale*, *i. e.*, of the most fair of the tenements which she hath as guardian in socage, after the value of the third part which she claims by her writ of dower, to have the tenements holden by knight-service. And if the wife cannot gainsay this, then the judgment shall be given, that the guardian in chivalry shall hold the lands holden of him during the nonage of the infant quit from the woman, &c."

SECTION 23. HOMESTEAD.

The estate of homestead is in reality rather an exemption from liability of being taken on execution than a true estate. Every homestead estate must also be some other kind of estate. Homestead estates are of purely statutory origin, and are governed in all respects by the provision of the statutes creating them.¹³

Homesteads may be claimed by a "head of family" for their benefit. It may be claimed by the husband,

¹³ See Statutes of the several States.

and after his death, by the wife, who generally has the right to claim it for herself, though she may have no children. An unmarried person who has unmarried dependent relatives living with him, may also claim it. The tests in doubtful cases are: 1. Whether there is a legal or moral duty to support the persons who are claimed to constitute the family. 2. Whether such persons are actually dependent upon him. Likewise an unmarried woman, supporting the children of a deceased or invalid sister, is entitled to it. A homestead is the place where one dwells. The rules and principles which determine one's domicile apply to homestead. While one may have two or more residences he can have but one homestead. In order that the homestead right may be claimed in a lot or parcel of land, it must be shown to be the bona fide residence of him and his family. The party claiming homestead must be in possession of the land in his own right. A remainder man, cannot claim the right of homestead.

SECTION 24. ESTATES LESS THAN FREEHOLDS.

The feudal system recognized no estate less than freeholds. Interests less than freeholds might be created by contract, but originally in case of the breach of such a contract there could only be a suit for damages, and not an action to recover possession. Later the law began to protect the possession of those holding less than a freehold. The writ of ejectment which was originally only used in the case of estates less than freehold, has now become (in most states) the only method of trying the right of title to real property.

The four species of estates less than freehold are estates for years, estates at will, estates from year to year and estates at sufferance. Tenancies at will

still exist in the two following classes of cases; 1. Where the land is leased for an indefinite period without any reservation of rent. 2. Where rent is reserved, but it is expressly agreed that the tenancy is to be a tenancy at will.

SECTION 25. ESTATES FOR YEARS.

An estate for years is an estate for any definite period, even if less than a year. A lease from one year from a specified date will terminate at midnight of the preceding day of the next year.¹⁴ A tenant for years who holds over beyond the termination of his lease does not become a tenant for another year unless the landlord so elects.¹⁵

Covenants in a lease providing for its termination or failure of the lessee to comply with specified conditions are for the benefit of the lessor only, and the lessee cannot by a breach of its covenants, abrogate the lease, and thus secure advantage from his own default.¹⁶

SECTION 26. ESTATES AT WILL.

Estates at will are estates which are not held for any definite period, which are terminable at the will of either party. A tenancy at will is terminable by a demand for possession, without any formal notice to quit.¹⁷ Tenancies at will have now been generally superceded by tenancies from year to year.

SECTION 27. ESTATES FROM YEAR TO YEAR.

A tenancy from year to year is practically a form of the tenancy at will, out of which it grew. This

Buchanan vs. Whitman, 151 N. Y., 253; 45 N. E., 556.

¹⁴ Condon vs. Brockway, 157 Ill., 90; 41 N. E., 634.

¹⁵ Brown vs. Cairus, 63 Kan., 584; 66 Pac., 639.

¹⁷ Peters vs. Balke, 170 Ill., 304; 48 N. E., 1012.

tenancy differs from the tenancy at will in that while the latter can be terminated at any time, this tenancy can only be terminated at certain periodic periods. Whether a tenancy of this character shall be construed as a tenancy from year to year, or one from month to month will depend upon the character and use of the property and the reservation of the rent. Whatever the term may be which is thus taken as the unit, as it were, of the term of possession, if the tenant holds over from one of such periods into another he is entitled to possession till the completion of such new period.

SECTION 28. ESTATES AT SUFFERANCE.

An estate at sufferance is the lowest estate known to the law. It exists where a tenant rightfully in possession continues to occupy the property after the expiration of his term. The tenant in such a case is but one step above a mere trespasser, he holds the property merely at the sufferance of the landlord and is not entitled to notice to quit.

CHAPTER III.

ESTATES CLASSIFIED AS TO QUALITY.

SECTION 29. IN GENERAL.

In addition to being classified as to their quantity, estates are also classified as to their quality. By the quality of the estate, is meant its certainty of continuance. Estates as to their quality are first divided into absolute estates and conditional estates. Any estate, whatever its quantity, may be either absolute or conditional. An absolute estate is one which is certain, that is, an estate which is certain to continue for the full period for which it is granted. The termination of an absolute estate may be determined by an event whose exact date is uncertain, as for example, the death of the tenant.

A conditional estate, or as it is variously called, a base, determinable, or qualified estate, is one which involves the element of uncertainty. It is an estate whose commencement, continuation, or termination is dependant upon the happening or not happening of some event. Expressed in another way, an estate of this character is one which may never come into existence, or which may be terminated before the expiration of the full period for which it was granted. The various classes of conditional base determinable qualified estate are as follows: fee-conditionals; estates on condition, such estates being divided into estates on condition precedent, and estates on conditions subsequent; estates upon limitation; and conditional limitations.

SECTION 30. FEE-CONDITIONALS.

A fee-conditional was an early species of estate at common law which was in effect a life estate granted to the first taker which upon the birth of issue would be enlarged into an estate in fee-simple.

The object of the enlargement of the estate was for the purpose of providing for such issue, but immediately upon such birth the first taker acquired the full right of disposition of the property and could defeat both the right of his child and the purpose of the grant. For this reason the fee-conditional was abolished by the statute of DeDonis (1285), and the estate in fee-tail substituted for it.¹

SECTION 31. ESTATES ON CONDITION.

An estate on condition is an estate which is created, enlarged or defeated by the happening or not happening of some event. As already stated in the previous section, estates on condition are divided into estates on condition precedent and estates on condition subsequent.

SECTION 32. CONDITIONS PRECEDENT.

A condition precedent is one, upon the fulfillment of which, the estate comes into existence. In the case of such a condition, the grantee has no rights prior to the fulfillment of the condition, when he acquires an absolute estate.

If the condition is illegal the estate can never vest. Where a smaller estate will be enlarged into a greater one upon the fulfillment of a certain condition, such condition is a condition precedent as to such enlarged estate.

¹ See Section 19.

SECTION 33. ESTATES ON CONDITION SUBSEQUENT.

An estate upon condition subsequent is one which will be terminated by the happening or not happening of a certain event. The condition may be either one involving the use of the land or it may be a collateral one. The happening of the event also may depend upon the act or will of the holder of the conditional estate or may be independent of his control. For example, the condition might be that a certain part of the property should not be built upon; that the holder of the estate could not remove from a certain place; or that a certain event entirely beyond the control of the holder of the estate should not take place.

If the condition is illegal or against public policy, the condition is disregarded and the estate becomes an absolute one. A striking contrast is to be observed in this respect between the effect of illegality on a contract of this kind and the effect of illegality upon a condition precedent.

Upon the breach of a condition subsequent there must be an entry by the person entitled to the reversionary estate in order to work forfeiture. There can never be a remainder after an estate upon condition subsequent.²

The law at the present time looks with very great

* "The second thing is, that no entry nor re-entry (which is all one) may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs, and such re-entry cannot be given to any other person. For if a man letteth land to another for term of life by indenture, rendering to the lessor and to his heirs a certain rent, and for default of payment a re-entry, etc., if afterward the lessor by a deed granteth the reversion

of the land to another in fee, and the tenant for term of life attorn, etc., if the rent be after behind, the grantee of the reversion may distrain for the rent, because that the rent is incident to the reversion; but he may not enter into the land and oust the tenant, as the lessor might have done, or his heirs if the reversion had been continued in them, etc. And in this case the entry is taken away forever; for the grantee of the reversion cannot enter,

disfavor upon conditions subsequent (which have the effect of unsettling land titles) and the tendency at the present time is to substitute restrictions for those conditions affecting the use of the land, and to do away with collateral conditions subsequent.

SECTION 34. RESTRICTIONS.

A restriction is a limitation upon the use of property contained in the deed creating this estate. Restrictions differ from conditions subsequent in that their breach will not work a forfeiture of the estate. A breach of a restriction may be redressed by a suit for damages, or restrained by an injunction.

SECTION 35. ESTATES ON LIMITATION.

An estate on limitation is one created to continue until the happening of a certain event. In the creation of an estate upon limitation the words which mark the termination of the estate are used in connection with the words of grant. Estates upon limitation are generally created by the use of such words as "while," "as long as," "until," etc.

SECTION 36. COMPARISON BETWEEN ESTATES UPON LIMITATION AND ESTATES UPON CONDITIONS SUBSEQUENT

An estate upon limitation differs from an estate upon conditions subsequent in three respects; (1) No

causa qua supra. And the lessor not his heirs cannot enter; for if the lessor might enter, then he ought to be in his former state, etc. and this might not be, because he hath aliened from him the reversion.'

"Here Littleton reciteth one of the maxims of the common law; and the reason hereof, is, for avoiding of maintenance, suppression of right, and stirring

up of suits; and therefore nothing in action, entry, or re-entry, can be granted over; for so, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession." Coke Vol. II, p. 84-85

See Chapter IV on Remainder.

entry is required in order to work a forfeiture of an estate upon limitation upon the happening of the event which marks its termination; (2) There may be a remainder after an estate upon limitation but not after an estate upon condition subsequent. The reason for this is that in the case of a remainder after an estate upon limitation the remainder is not considered to vest in derogation of the preceding estate. (3) If the condition in the case of the condition subsequent is the happening of an illegal act, or an act which is considered against public policy, the condition is void and the estate becomes absolute. In the case of an estate upon limitation, the restriction on the continuation of the estate is not disregarded because it is against public policy or involves an illegal act. Thus in a grant to A for life on condition that he shall not marry, the condition will be disregarded, as being against public policy, and A will take an absolute life estate; while a grant to A "as long as he remains single" is good and A's marriage would mark the termination of the estate.

SECTION 37. CONDITIONAL LIMITATIONS.

"A conditional limitation partakes of the nature both of a condition and a remainder. It is to be observed, that at the common law, whenever either the whole fee, or a particular estate, as an estate for life, or in tail, was first limited, no condition or other quality could be annexed to this prior estate which would have the double effect of defeating the estate and passing the land to a stranger; for, as a remainder, it was void, being an abridgement or defeasance of the estate first limited; and, as a condition, it was void, as no one but the donor of the heirs could take advantage of a condition broken, and the entry of the donor or his heirs un-

avoidably defeated the livery, upon which the remainder depended. On these principles it was impossible, by the old law, to limit by deed, if not by will, an estate to a stranger, upon any event which went to abridge or determine an estate previously limited. But the expediency and utility of such limitations, assisted by the revolution effected in our law by the statute of Uses, at length forced them into use, in spite of the maxim of law, that a stranger cannot take advantage of a condition. These limitations are now become frequent, and their mixed nature has given them the appellation of conditional limitations; they so far partake of the nature of conditions, as they abridge or defeat the estate previously limited; and they are so far limitations, as, upon the contingency taking place, the estate passes to a stranger. Such is the limitation to A for life, in tail, or in fee, provided, that when C returns from Rome, it shall from thenceforth remain to the use of B in fee. Of late, however, it has been frequently argued, that the difference between a remainder, and what is generally understood by a conditional limitation, is merely verbal.”^s

^s Appendix to Coke Institutes.

CHAPTER IV.

ESTATES CLASSIFIED AS TO TIME OF THEIR ENJOYMENT.

SECTION 38. IN GENERAL.

Estates as to the time of their enjoyment are divided into estates in possession and estates in expectancy. An estate in possession is one which entitles the holder to the possession of the property at the present time. An estate in expectancy is one which is to begin in the future. Estates in expectancy are divided into reversions and remainders.

SECTION 39. REVERSIONS.

A reversion is the estate left in the grantor or his heirs after the preceding estate or estates have been granted away. A reversion is the residuary estate and always exists where the full fee has not been granted away.

If the estate reverting to the grantor or his heirs depends upon a contingency; the estate is then known as a possibility of reverter. Thus, there will be a reversion after a life estate, or after an estate for a term of years, but a possibility of reverter after a fee-tail or an estate on condition subsequent.

SECTION 40. REMAINDERS.

A remainder is a future estate created in favor of some other person than the grantor. There are four important general rules governing the creation of remainders. (1) The remainder must have a preceding estate to support it; (2) The remainder must be created

at the same time as the preceding estate; (3) The remainder must take effect immediately after the termination of the preceding estate; and (4) The remainder must not take effect in derogation of the preceding estate. This last rule explains why there cannot be a remainder after an estate on condition subsequent.

SECTION 41. CLASSIFICATION OF REMAINDERS.

“Remainders are either vested or contingent. Vested remainders, or remainders executed, are those by which a present interest passes to the party, though to be enjoyed *in futuro*, and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As if A, be tenant for years, remainder to B in fee: hereby B’s remainder is vested, which nothing can defeat or set aside.¹ The person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, an estate *in presenti*, though it is only to take effect in possession and permanency of the profits at a future period. And such an estate may be transferred, aliened, and charged, much in the same manner as an estate in possession.²

“A remainder is contingent when it is limited to take effect on an event or condition, which may not happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate; in which case such remainder never can take effect.³ It is not, however, the uncertainty of ever taking effect in possession, that makes a remainder contingent, for to that every remainder

¹ 2 Bl. Com., 169.

² 2 Cro. Dig., 260, 261.

³ Fearn. Cont. Rem., 3.

for life, or in tail, expectant on an estate for life, is and must be liable; as the remainder-man may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.”⁴

SECTION 42. CONTINGENT REMAINDERS.

Contingent remainders are those in which both the right of property and right of enjoyment are postponed.⁵ Besides the general rules governing all remainders, there are certain special rules governing contingent remainders as follows; (1) the preceding estate in the case of a contingent remainder must be a freehold; and (2) the contingency must not be illegal,

⁴ Fearn. Cont. Rem., 329; Prest. Est., 32, 33. Note to Thomas' Edition of Coke Institute.

⁵ According to Mr. Fearn, there are four kinds of contingent remainders:—1st. Where the remainder depends entirely on a contingent determination of the preceding estate itself. As if A. makes a feoffment to the use of B. till C. returns from Rome, and after such return of C. then to remain over in fee; here the particular estate is limited to determine on the return of C. and only on that determination of it is the remainder to take effect; but that is an event which possibly may never happen; and, therefore, the remainder, which depends entirely upon the determination of the preceding estate by it, is contingent. 3 Rep., 20 a. Et. vid. *Arton v. Hare*, Poph. 97. *Large's case*, 3 Leon. 182. 2d. Where some uncertain event, unconnected with, and collateral to the de-

termination of the preceding estate, is, by the nature of the limitation, to precede the remainder; as in the case of *Doe d. Planner v. Scudamore*, cited above, and in the instance put by Lord Coke of a lease for life to A., B., and C., and if B. survive C. then the remainder to B. and his heirs; here the event of B.'s surviving C. does not affect the determination of the particular estate; nevertheless, it must precede and give effect to B.'s remainder; but as such event is dubious, the remainder is contingent. Fearn. Cont. Rem. 4, 5. 3d. Where it is limited to take effect upon an event, which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate; as if a lease be made to I. S. for life, and after the death of J. D. the lands to remain to another in fee; now it is certain that J. D. must die some time

against public policy, double or too remote.

The reason why a contingent remainder can only be created to take effect after a freehold must be found by a reference to the Feudal principles of land-owner-

or other; but his death may not happen till after the determination of the particular estate by the death of J. S. and therefore such remainder is contingent. 3 Rep. 20 a. And 4th. Where it is limited to a person not ascertained, or not in being at the time when such limitation is made; as if a lease be made to one for life, remainder to the right heirs of J. S. *Supra*, 378 a. Et vid. 3 Rep. 20 a. So where a remainder is limited to the first son of B. who has no son then born; here B. may never have a son, or if he should, the particular estate may determine before the birth of such son; therefore this remainder is contingent. 1 Vent. 806. So if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent; because it is uncertain which of them will be the survivor. Cro. Car. 102. Fearn. Cont. Rem. 6. It should however, be observed, that there are some cases which fall literally under one or other of the 3d and 4th descriptions, which are nevertheless ranked among vested estates. With respect to those cases which are exceptions to the third kind of contingent remainders, it has been held, that a limitation to A. for eighty or ninety years, if he shall so long live, with a remainder over, after the death of A., to B. in fee, is not deemed a contingent remainder; for the mere possibility, that a life in being may endure for eighty or ninety years after such a limitation is made, does not amount to a degree of uncertainty sufficient to render a remainder contingent. *Napper v. Sanders*, Hutt. 119. *Lord Derby's case*, Lit. Rep. 370.

Pollexf. 67. But if the term of years is so short, as to leave a common possibility, that the life on which it is determinable may exceed it, the remainder will be deemed contingent. And therefore, if an estate is limited to A. for twenty-one years, if he shall so long live, and after his death to B. in fee, this is a contingent remainder; because there is no improbability in supposing that the life may exceed the term. 3 Rep. 20 a. Et vid. *Beverley v. Beverley* 2 Vern. 131. Fearn. Cont. Rem. 20, 23. The exceptions to the fourth sort of contingent remainders arise, first, from a rule of law, that wherever the ancestor takes an estate of freehold, and a remainder is thereon limited in the same conveyance to his heirs, or to the heirs of his body, such remainder is immediately executed in the ancestor so taking the freehold, and is not contingent. *Shelley's case*, 1 Rep. 104. Fearn. Cont. Rem. 30. *Infra* n. (p). Secondly, from a principle that an ultimate limitation to the right heirs of the grantor will continue in him, as his old reversion, and not as a remainder, although the freehold be expressly limited from him. Post, 22 b. Thirdly, from the respect which the law pays to the intent of a testator, where it can be plainly collected from his will, that he used the words *heirs of the body*, as a *descriptio personæ*, or sufficient designation of the person for the remainder to vest, notwithstanding the general rule, that *nemo est hæres viventis*. Fearn. Cont. Rem. 319. But the cases falling under this last exception, have been either, where the limitation to the heir special

ship. Under the Feudal system, seisin must exist at all times in some person and seisin could only be transferred at the time the estate was created. In the case of a freehold estate followed by a remainder, the seisin

has been qualified by the words "now living," or some other circumstances have appeared in the will, to manifest the testator's intention, that the estate should vest. See *Burchett v. Durdant*, 3 Ventr. 311. Cart. 154. *Long v. Beaumont*, 1 P. Wms. 229. 1 Eq. Abr. 114. 2 Eq. Abr. 331. 1 Bro. P. C. 489. *Goodright v. White*, 2 Bl. Rep. 1010. And it is also observable, that there was not one of these cases in which the ancestor took the legal estate of freehold. To sum up the distinctions between vested and contingent remainders, it may be observed, that wherever the preceding estate is limited, so as to determine on an event which certainly must happen; and the remainder is so limited to a person in esse and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. *Berrington v. Parkhurst*, 3 Atk. 135. Willes, 327. 6 Bro. P. C. 352. On the contrary, wherever the preceding estate (except in the cases before-mentioned, as exceptions to the descriptions of a contingent remainder) is limited so as to determine only on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not in esse, or not ascertained; or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent. Fearn. Cont. Rem. 330, 331.

With respect to the effect of contingent remainders intervening between the particular estate and the remainders over, in making them contingent, it is observable, that wherever a contingent remainder is limited, which is followed by another limitation over, if the contingent limitation be not in fee, the subsequent limitation may be vested, if it be made to a person in esse. Fern. Cont. Rem. 338. As upon a feoffment to the use of the feoffees during the life of A., and after his death, to the use of his first and other sons successively in tail, with several remainders over; and A. having no sons at the time of the feoffment, it was resolved that all the uses limited to persons not in esse were contingent, but the uses to persons in esse were vested immediately; and that the contingent uses when they should come in esse, would vest by interposition, if the estate for life, which ought to support them, was not disturbed. *Chudleigh's case*, 1 Rep. 137. And where, in the same conveyance, an estate for life is limited to a person, and after that a contingent remainder to another, followed by a remainder to the heirs or heirs special of the first tenant for life, this last limitation shall be esteemed executed only *sub modo*; that is, in such manner as to open and separate itself from the first estate for life, when the contingency happens. *Lewis Bowles' case*, 11 Rep. 80. The preceding cases are instances, where the contingency of the intervening remainders arose from their being limited to persons not in esse. But if there be a remainder limited to a person in esse, so as to depend on a

could pass to the tenant of the particular estate and at the expiration of his estate could pass from him to the remainder-man. Again, in the case of an estate less than freehold followed by a vested remainder, the

contingent event, if the same contingency be not considered as extending to the subsequent limitations, such of those limitations as are to persons in esse may be vested; as in the case of *Napper v. Sanders*, Hutt. 119; where, upon a feoffment made by A. to the use of himself for life, and after to the use of the feoffees for eighty years, if B. and C. his wife should so long live; and if C. survived B. her husband, then to the use of her for life; and after her decease to the use of D. in tail, remainder over; though it was agreed, that C.'s estate for life was contingent, on the event of her surviving husband, yet it was held, that the subsequent remainders were vested. Et vid. *Tracey v. Lethulier*, 3 Atk. 774. Ambl. 204. *Whitfield v. Bewit*, 2 P. Wms. 240. So a subsequent contingent remainder may become vested in interest before a preceding one, which will be no obstruction to its so vesting. *Uvedale v. Uvedale*, 2 Roll. Abr. 111. But where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested. *Loddington v. Kime*, 1 Salk. 224. Ld. Raym. 208. *Doe v. Holmes*, 3 Wils. 237, 241. 2 Bla. 777. *Goodright v. Dunham*, Dougl. 251. *Doe v. Perryn*, 3 T. R. 484. It seems, however, that a contingent interminable fee, devised in trust for some special purposes only, will not prevent a subsequent limitation to one in esse from being vested. See *Tracey v. Lethulier*, supra. Fearn. Cont. Rem. 342. Sed vid. n. (a), 6th edit. p. 226. And where estates are subject to a power of appointment in the first taker, with remainders

over in default of such appointment, such a power does not suspend the effect of the subsequent limitations, and keep them in contingency. Fearn. Cont. Rem. 343, 344. Et vid. acc. *Maundrell v. Maundrell*, 7 Ves. 567. 10 Ves. 246. Sugd. Pow. 141. It is further to be observed, that although a fee cannot, in conveyance at common law, be mounted on a fee, yet two or more several contingent fees may be limited, merely as substitutes or alternatives, one for the other, and not to interfere; but so that one only can take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect, *Loddington v. Kyme*, 1 Ld. Raym. 203. *Barnardiston v. Carter*, 3 Bro. P.C. 64. *Doe v. Holme*, 2 Bla. 777. Fearn. Cont. Rem. 547, 550; as where a will was made in these words: "I give my messuage, &c. to my son J. S. for his life, and after his death unto all and every his children equally, and to their heirs; and in case he dies without issue, I give the said premises unto my two daughters and their heirs, equally to be divided between them;" it was determined, that both the devisees were contingent remainders in fee. *Goodright v. Dunham*, Dougl. 265. Et vid. *Doe v. Perryn*, 3 T. R. 484. *Ives v. Legge*, cited 3 T. R. 488. *Crumph. d. Woolley v. Norwood*, 2 Marsh. 161. Such limitations are sometimes called limitations on a contingency with a double aspect; sometimes limitations on a double contingency; and sometimes concurrent or contemporary limitations; as to which denominations see Mr. Douglas's

remainder-man could take the seisin. In the case, however, of an estate less than freehold followed by a contingent remainder, neither the tenant of the particular estate nor the contingent remainder-man would be

note (2) *Doe v. Fonnereau*, Dougl. 504. But in all cases where the first contingent remainder is in fee, or where there are concurrent remainders, if the first remainder becomes vested, all the subsequent remainders are void: for then they become remainders expectant on the determination of an estate in fee-simple. 2 Cru. Dig. 286. *Keene v. Dickson*, 3 T. R. 495.

As to the cases wherein a contingency annexed to a preceding estate is, or is not, considered as a condition precedent to give effect to the ulterior limitations, such cases may be distinguished into three classes. 1st. Limitations, after a preceding estate, which is made to depend on a contingency that never takes effect. 2dly. Limitations over upon a conditional contingent determination of a preceding estate, where such preceding estate never takes effect at all. 3dly. Limitations over upon the determination of a preceding estate by a contingency, which, though such preceding estate takes effect, never happens. Fearn. Cont. Rem. 355. 1st. The cases of *Napper v. Sanders*, and *Tracey v. Lethulier*, above mentioned, appear to fall under the first class; in which cases, we have seen, the contingency affected only that estate, to which it was first annexed, without extending to the ulterior limitations. Et vid. *Bradford v. Foley*, Dougl. 63. *Horton v. Whitaker*, 1 T. R. 346. The construction in these cases, as to the restriction of the contingency, to the estate first hinged upon it, appears to depend on the testator's apparent intention, not to extend it further. For, wherever there is no

apparent distinction in view in this respect, between such estate, and those which follow it, the contingency, it seems, will equally affect the whole ulterior train of limitations. *Davis v. Norton*, 2 P. Wms. 390. *Doe v. Sheppard*, Dougl. 75. Fearn. Cont. Rem. 358. 2d. As an instance of that class, where subsequent estates were limited, on a conditional determination of a preceding estate, and such preceding estate never took effect at all; we may refer to the case of a devise to trustees for eleven years, remainder to the first and other sons of B. successively in tail-male, provided they should take the testator's surname; and, in case they or their heirs should refuse to take the testator's surname, or die without issue, remainder to the first son of C., remainder over. B. died without having had any son, C. had a son at the time of the devise. The court did not agree as to the validity of the devise to the first son of B., being after a term of years, without any preceding freehold to support it; but resolved that the subsequent limitation to the first son of C., who was then in esse, and capable, took effect; and that the preceding limitation to the first son of B., or the condition thereto annexed, did not operate as a precedent condition which must happen, to give effect to the subsequent limitation to the son of C., but was only a precedent estate attendant with such limitation. *Scatterwood v. Edge*, 1 Salk. 229. Of the same opinion was Lord Hardwicke, in the case of *Avelyn v. Ward*, 1 Ves. 422; who said he knew of no case of a remainder or conditional limita-

able to take seisin and therefore the contingent remainder would fail.

The classification of contingent remainders most generally used at the present time, is as follows:

tion over, of a real estate, whether by way of a particular estate, so as to leave a proper remainder, or to defeat an absolute fee before limited by conditional limitation, but if the precedent limitation, by what means soever, be out of the case, the subsequent limitation should take place. *Fearn. Cont. Rem.* 361. 3d. As to cases of the third class, it may be observed, that although where a remainder is limited to take effect on a condition annexed to a preceding estate, and that preceding estate fails, it appears, that the remainder shall nevertheless take place; yet, where such preceding particular estate takes place, and the condition is not performed, the remainder, it has been held, will not take effect at the expiration of such preceding estate, unless in those cases where the apparent general intention of the testator calls for it. *Fearn. Cont. Rem.* 362.

It sometimes happens, that a remainder is limited in words which seem to import a contingency, though in fact they mean no more than would have been implied without them; or do not amount to a condition precedent, but only denote the time when the remainder is to vest in possession. Thus, where there was a devise of land to A. and B. for eight years, and after the said term to remain to the testator's executors, till such time as H. should accomplish his age of twenty-one years; and when the said H. should come to his full age of twenty-one years, then the testator willed that H. should enjoy the lands to him and his heirs forever. H. died under twenty-one; and it was contended that

the remainder did not vest in H., because he did not live to attain the age of twenty-one years; for that, as he was not to have it until his age of twenty-one, it was contingent on that event, it being uncertain whether he ever would attain that age. But it was held, that the case was nothing else in effect, than a devise to the executors till H. attained the age of twenty-one years, remainder to H. in fee; and that the adverbs of time, when, &c. and then, &c. do not make anything necessary to precede the settling of the remainder, any more than in the common case of a lease for life or years, and after the decease of the lessee or the term ended, remainder to another, in which cases the remainder vests presently. And that these adverbs expressed the time when the remainder to H. should take effect in possession, and not when it should become vested. *Boraston's case*, 3 Rep. 19. *Fearn. Cont. Rem.* 367, 8. Et vid. 1 P.Wms. 170. *Holcroft's case*, Moor, 487. *Webb v. Herring*, Cro. Jac. 416. *King v. Rumball*, Cro. Jac. 448. *Chadock v. Cowley*, Cro. Jac. 695. *Fortescue v. Abbott*, Pollexf. 479. T. Jo. 79. *Anon.* 2 Ventr. 365. *Goodtitle v. Whitby*, 1 Burr. 228. *Doe v. Lea*, 3 T. R. 41. And see the late case of *Doe, d. Hunt v. Moore*, in which it was held, that, under a devise of real estate in fee to J. M. *when he attains the age of twenty-one* but in case he dies before twenty-one, then to his brother, when he attains twenty-one; with like remainders over; J. M. the devisee took an immediate vested interest, liable to be divested upon his dying under

First; Where the contingency consists in the happening or not happening of a certain event, and second; where the remainder is contingent because the

twenty-one. 14 East, 601. (Ed.)

(F) Here we shall offer some remarks, 1st. With respect to the nature of the event upon which a contingent remainder may be limited. 2d. As to the estate necessary to support a contingent remainder. The doctrine with respect to the time when a contingent remainder must vest, will be explained in a subsequent part of this chapter.

1st. With respect to the nature of the contingency upon which a remainder may be limited:—It is to be observed, 1st. That it must be a legal act, "for the law (says Lord Coke, 2 Rep. 51 b.) will never adjudge a grant good by reason of a possibility or expectation of a thing which is against law; for it is *potentia remotissima et vana*, which by intendment of law *nunquam venit in actum*." 2d. It must be *potentia propinqua*; as death, or death without issue, or coverture. Hence it has been determined, that a remainder to a corporation, which is not in being at the time of the limitation, is void, although it be erected afterwards, during the particular estate. 2 Rep. 51 a. So, although a lease for life, remainder to the right heirs of J. S. is good; yet, if there be no such person as J. S. at the time of the limitation of the remainder, notwithstanding such a person should afterwards be born, and die during the life of the tenant for life, his heir shall not take by virtue of such limitation; because the possibility on which the remainder is to take effect is too remote; for it amounts to the concurrence of two several contingencies, viz. 1st. That such a person as J. S. should be born, which is very uncertain; and 2dly. That he should also

die during the particular estate, which is another uncertainty grafted upon the former. This is called a possibility upon a possibility, which Lord Coke observes, is never admitted by intendment of law. Ant. 25 b. vol. 1. p. 541; 184a vol. 1, p. 743. *Cholmley's case*, 2 Co. 51 b. Upon the same ground arises the distinction between a remainder limited by a general description, as to the right heirs of J. D., who is alive, or *primogenito filio* of B., who has no son then born, which is good; and one limited by a particular name to a person not in esse, which is void. Fearn. Cont. Rem. 375, 378. 3d. It must not be repugnant to any rule of law. 6 Rep. 40 b. 4 Burr. 1941. 4th. Nor contrariant in itself. *Jermin v. Arscot*, 1 Rep. 85 a. *Cholmley v. Humble*, 1 Rep. 86 a. *Corbet's case*, 1 Rep. 83 b. *Mildmay's case*, 6 Rep. 40. *Foy v. Hinde*, Cro. Jac. 697. 5th. That it must not operate so as to abridge, defeat, or determine the particular estate. Plowd. 29 b. 2 Leon. 16. Plowd. 24. *Sayer v. Hardy* Cro. Eliz. 414. This rule not only flows, of necessity, from the nature of a remainder, as exhibited in the above definition of it by Lord Coke, but also follows, as the consequence of a maxim at common law, that none shall take advantage of a condition, but the party from whom the condition moves (i. e. the grantor) and his heirs; for, if he or his heirs take advantage of a condition, by entry or claim, the livery made upon the creation of the estates is defeated; and, of course, every estate then created is thereby annulled and gone. But the remainder ought to vest at the instant of the expiration of the preceding estate, and remain-

persons to take in remainder are not ascertained or not *in esse*.

Anything which defeats the particular estate will defeat the contingent remainder depending upon it.

ders are defeated by the entry of the grantor, therefore such remainder is void. It follows, that a remainder properly so called, cannot be limited to take effect upon a condition, which is to defeat the particular estate, whether such condition be repugnant to the nature of the estate to which it is annexed, or not. Fearn. Cont. Rem. 391. And the same law holds with regard to a subsequent remainder, limited to take effect on a condition, which is to defeat a preceding remainder. *Cogan v. Cogan*, Cro. Eliz. 360. Where, however, land is leased to one for life, and, if such a thing happen, then to remain to B., this shall not be understood as intended to vest in possession, immediately upon the happening of the condition, and in abridgment of the preceding estate; for then, by the last mentioned rule, the remainder would be void; but it shall be construed to vest in interest upon the happening of the condition, and to remain as a remainder ought to do; that is, so as to await the determination of the preceding estate, before it comes into possession. *Colthirst v. Bejushin*, Plowd. 23. Fearn. Cont. Rem. 393. It may also happen, that notwithstanding a contingent limitation is expressed to commence from a period eventually anterior to the determination of the particular estate, yet the nature of the case may be such, as not to admit of its taking effect in possession in restraint, abridgment, or exclusion of the particular estate; as if such limitation over were to the grantee or devisee of the particular estate; which, instead

of operating in any degree to defeat, exclude, or curtail the particular estate, would in effect remove its limits, and open it into a greater estate. Thus, in the case of a lease to two, with a limitation over, after the death of the first of them, to the survivor, this does not avoid, defeat, or abridge the estate of the survivor, but embraces it under the afflux of a greater, into which it will run under the technical term of merging, instead of being rescinded or nullified. The grantor or his heir can have no title to enter and defeat the particular estate, because there is no condition or proviso to make it cease, or carry the estate either expressly or implicatively to any body, from the devisee of the particular estate. Nor can the limitation operate to the prejudice of another, viz. the person otherwise entitled to the particular estate; because it is to that very person himself, and the effect would have been precisely the same, if the limitation had been, and from and after the determination of the estate aforesaid, then to the survivor in fee. Nothing, therefore, will, in such case, prevent the limitation over from operating strictly, as a remainder at common law. *Goodtitle v. Billington*, Dougl. 725. Fearn. Cont. Rem. 397, 8. It is further to be observed, that although no remainder can be limited on a condition; yet, it has been long settled, that, where in a devise a condition is annexed to a preceding estate, and upon the breach or non-performance thereof, the estate is devised over to another, the condition shall operate as a

The leading case on this point is the case known as *Archer's Case*.⁶ The decision in which case was as follows:

limitation, circumscribing the measure and continuance of the first estate; and that upon the breach or performance of it, as the case may be, the first estate shall ipso facto determine and expire, without entry or claim; and the limitation over shall thereupon actually commence in possession; and the person claiming under it, whether heir or stranger, shall have an immediate right to the estate. Thus is the testator's intention effectuated, by substantiating the subsequent estate, though limited to a stranger; and enforcing the performance of the condition, by the determination of the preceding estate upon the breach of it, notwithstanding that preceding estate be limited to the heir himself: and limitations of this kind are properly called *conditional limitations*. Fearn. Cont. Rem. 405—9. Thus, where a person devised lands to his mother for life, and after her death to his brother in fee; provided that if his wife (being then enseat) be delivered of a son, that then the land should remain to him in fee; after the testator's death, a son was born; and it was held, that the fee of the brother should cease, and vest in the son upon the happening of the contingency. Dyer, 127 n. Id. 33 n. Cro. Jac. 592. Palm. 135. So, where A. devised lands to his wife for life, and after her death to his grandchild B. and the heirs of her body; provided always, and upon condition that she married with the consent of D., E., and F., or the major part of them, and in case she should marry without such consent, or die without issue, then he devised the premises to C. (neither B. nor C. being heir at law to the

testator). After the testator's death B. married without the consent of any of the persons named for that purpose; and it was clearly held to be an estate to B. till she married without such consent; that here was an estate-tail devised to B. subject to two limitations, the one in law, viz. dying without issue, the other express, and in fact, viz. marrying without consent; which was properly a conditional limitation, and not a condition; for, if it were a condition, it would descend to the heir at law, and he might enter for breach of it, and defeat the limitation over; and it was therefore agreed, that the marriage without consent determined her estate-tail, and cast the possession immediately on C. *Lady Ann Fry's case*, 1 Ventr. 199. Et vid. *Shuttleworth v. Barber*, 2 Mod. 7. But where there is no express limitations over to take effect upon the breach or performance of the condition, annexed to the preceding estate; there, it seems, the condition or proviso is not always construed as a conditional limitation. *Gulliver v. Ashby*, Fearn. Ex. Dev. 60. Limitations of this nature may also take effect by way of use; for a use may be limited to cease as to one person upon a future event, and to vest in another Fearn. Cont. Rem. 412. With respect to those cases where particular estate is limited, with a condition, that after the performance of a certain act, or the happening of a certain event, the person to whom the first estate is limited, shall have a larger estate, see the last chapter, ante, p. 18, n. (1).

2d. As to the estate necessary to support a contingent remainder:—Though in the case of a vested remainder it is sufficient,

⁶ Reported 1 Coke, 66 B., 159-7.

“Between Baldwin and Smith, in the Common Pleas, which began Trin. 39, Eliz. rot., 1676, in a replevin, upon a special verdict, the case was such; Francis Archer was seized of land in fee, and held it in socage,

if the particular estate be for years (for a lease at will is of too slender and precarious a nature to support a remainder over. 8 Rep. 75.), it is a general rule, that wherever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it. Fearn. Cont. Rem. 423. Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void: but if granted to A. for life, with a like remainder, it is good. 1 Rep. 130. For unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void; it cannot pass out of him without vesting somewhere; and in the case of a contingent remainder, it must vest in the particular tenant, else it can vest nowhere; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him; and consequently the remainder is void. 2 Bl. Com. 171. Fearn. Cont. Rem. 423, 24, 25. 3 Rep. 20. But a contingent remainder for years does not require a preceding freehold to support it; for the remainder not being freehold, no such estate appears requisite to pass out of the grantor, in order to give due effect to a remainder of that sort. Fearn. Cont. Rem. 429, 43. Although every contingent freehold remainder must be supported by a preceding freehold, yet it is not necessary that such preceding estate continue in the actual seisin of its rightful tenant; it is sufficient, if there subsists a right to such preceding estate, at the time the remainder should vest;

provided such right be a right of entry, and not a right of action only; for, whilst a right of entry remains, there can be no doubt that the same estate continues; since the right of entry can exist only in consequence of the subsistence of the estate; but when the right of entry is gone, and nothing but a right of action remains, it then becomes a question of law, whether the same estate continues or not; for the action is nothing more than the means of deciding the question. Another estate is, in the mean time, acknowledged and protected by the law, till such question be solemnly determined in a court of justice, upon the action brought. Fearn. Cont. Rem. 430, 431. Therefore, if A. be tenant for life, with a contingent remainder over, and tenant for life be disseised, all the estates are divested; but the right of entry of the tenant for life will support the contingent remainders; but in this case if the contingent remainder does not vest, before such a descent be cast as will take away the entry of tenant for life within the stat. 32 H. 8. c. 33, and drive him to his action, then is the contingent remainder gone; because there no longer subsists any right of entry to support it, that right being turned into a right of action. *Thomson v. Leach*, 12 Mod. 174. And for the same reason, where a contingent remainder is limited after an estate-tail, and the tenant in tail creates a discontinuance, the contingent remainder will be destroyed. 1 Rep. 135 b. This right of entry, however, to support a contingent remainder must be a present right; a fu-

and by his will in writing devised the land to Robert Archer the father, for his life, and afterwards to the next heir male of Robert, and to the heirs male of the body of next such heir male: Robert had issue, John, Francis died, Robert enfeoffed Kent with warranty upon whom John entered, and Kent re-entered, and afterwards Robert died, etc. At first, it was agreed by Anderson, Walmsley *et totum cur'*, that Robert had but an estate for life because Robert had an express estate for life devised to him, and the remainder is limited to the next male heir of Robert in the singular number; and the right heir male of Robert cannot enter for the forfeiture in the life of Robert, for he cannot be heir as long as Robert lives. Secondly, that the remainder to the right heir male of Robert is good, although he cannot have a right heir during his life; but it is sufficient that the remainder vests eo instanti, that the particular estate determines. And so it is agreed in 7 Hen. 4, 6b, and Cranner's Case 14 Eliz.,

ture one will not do: it must also precede the contingency, and be actually existing when that happens; for if it only commences at the same instant with it, the remainder, it seems, will not vest. Fearn. Cont. Rem. 433. And where the estates are limited by way of use, and are afterwards divested and turned to a right, it has been held that there must be an actual entry, in order to revert the estates. Fearn. Cont. Rem. 435. In regard to the estate requisite to support a contingent remainder, it is further to be observed, that the estate supporting, and the remainder supported, should both be created by one and the same deed or instrument: therefore an estate for life given by one deed, will not support a remainder given by another; nor an estate for life settled by A. on B. by deed, enure to support

a contingent remainder given by the will of A. Fearn. Cont. Rem. 446, 447. Et vid. *Snow v. Cutler*, Raym. 162. *Moor v. Parker*, 4 Mod. 316. *Weale v. Lower*, Pollexf. 66. *Doe v. Fonnereau*, Dougl. 486. It seems, however, that where the legal estate is in trustees, there is no necessity for any preceding particular estate of freehold, to support contingent remainders; for the legal estate in the general trustees will be sufficient for the purpose; and consequently, in such cases, it is not necessary, that a contingent remainder should vest by the time the preceding trust limitation expires. Fearn. Cont. Rem. 449, 450. Et vid. *Chapman v. Blissett*, Cas. Temp. Talb. 145. *Hopkins v. Hopkins* Forrest. 44. 1 Ves. 268. 1 Atk. 581.—Note to Thomas' Edition of Coke's Institutes.

Dyer, 309a. Thirdly, (which was the principal point of the case), it was agree *per totam cur'*, that by the feoffment of the tenant for life, the remainder was destroyed; for every contingent remainder ought to vest, either during the particular estate, or at least *eo instanti*, that it determines; for if the particular estate, be ended, or determined in fact, or in law, before the contingency falls, the remainder is void. And in this case, inasmuch as by the feoffment of Robert, his estate for life was determined by a condition in law annexed to it, and cannot be revived afterwards by any possibility; for this reason the contingent remainder is destroyed, against the opinion of Gascoigne, in 7 Hen. 4, 23b. But if the tenant for life has been disseised, and died, yet the remainder is good, for there the particular estate doth remain in right, and might have been vested, as it is said in 32 Hen. 6. But it is otherwise in the case at bar, for by his feoffment no right of the particular estate doth remain. And it was said it was so agreed by Popham, Chief Justice, and divers justices in the argument of the case between Dillon and Friene, and denied by none. See II. R. 2. tit, Detinue, 46. And note the judgment of the book, and the reason thereof, which case there adjudged is a stronger case than the case at the bar. But note, reader, that after the feoffment, the estate for life to some purpose had continuance, for all leases, charges, etc., made by the tenant for life shall stand during his life, but the estate is supposed to continue as to those only who claim by the tenant before the forfeiture, but as to all others who do not claim by the tenant for life himself, the particular estate is determined; and by the better opinion, the warranty shall bind the remainder, although the warranty was created before the remainder

attached or vested, and although the remainder was in the consideration of the law, and he who shall be bound by it, never could have avoided it by entry, or otherwise; yet forasmuch as the remainder did commence, and had its being by force of the devise, which was before the warranty, for this reason it shall bind the remainder; but the same was not unanimously agreed; and as the feoffment of the tenant for life shall destroy the remainder, which was in consideration of law, so, *et a fortiori*, the warranty of his ancestor, (by whom he is intended to be advanced) shall bind him. And in many cases one shall be bound, and barred of his right by a warranty, who could never have defeated it by any means, as in Edw. 44, 3, 30, and 44 Ass. p. 35. Lessee for life is disseised, to whom a collateral ancestor of the lessor releaseth, and dieth, he shall be barred. Vide, 3 Hen., 7, 9a, and 33 Hen. 8, Br. Guarantee, 84, a feme covert, who cannot enter nor avoid the warranty, shall be barred. So if the tenant for life, the remainder to the right heirs of J. S. had been disseised, and the disseisor had levied a fine at the common law, the right heir of J. S. shall be bound, and yet he could not enter nor make claim. But the point adjudged was, that by the feoffment of the tenant for life, the remainder was destroyed."

CHAPTER V.

ESTATES CLASSIFIED AS TO THE NUMBER OF OWNERS.

SECTION 43. IN GENERAL.

Estates are divided, as regards the number of owners, into estates in severalty and joint estates. An estate in severalty is one where there is individual ownership. An estate of this character needs no further explanation. Joint estates include all those estates where two or more persons have a right of ownership or possession in the same land at the same time. Joint estates are subdivided into joint tenancies, estates in common, estates in entirety, estates of coparcenary, and estates held by partnerships.

SECTION 44. JOINT TENANCY.

A joint tenancy is an estate held by two or more persons jointly so that during the lives of all they are equally entitled to the enjoyment of the land. Upon the death of one, his share vests in the survivor or survivors until there is but one survivor, when the estate becomes one in severalty in him. There may be a joint tenancy in fee, for life, or for years. A joint tenancy can only be created by purchase; it cannot be acquired by descent.

In the creation of a joint tenancy, four unities must be present, viz.; interest, title, time and possession. One tenant cannot hold for life and another in fee or one by one deed and another under a will. The estate of all must vest at the same time in order that there may be unity of time. One tenant cannot hold in possession

and another in reversion or remainder. Joint tenants, thus, must have one and the same interest arising from one and the same conveyance, commencing at one and the same time, and held by one and the same possession. Another incident of joint tenancy is the peculiar doctrine of survivorship.

Survivorship is the doctrine whereby the interest of a joint tenant upon his death falls to the survivor or survivors among the joint tenants.

A joint tenancy and the right of survivorship, however, may be destroyed by a conveyance by one joint tenant to a stranger. Such stranger at once becomes a tenant in common and the alienation thus destroys the survivorship. If there be more than two joint tenants the conveyance by one of his share will not affect the right of survivorship among the others, who are still joint tenants as to each other.

Formerly a joint estate was presumed to be a joint tenancy unless the contrary clearly appeared. At the present time however the law does not favor joint tenancies and every joint estate is held to be a tenancy in common, unless the instrument creating the estate expressly declares that the tenants shall hold in joint tenancy.

SECTION 45. TENANCY IN COMMON.

A tenancy in common is a joint estate without the four unities required in a joint tenancy. The only unity required is that of possession. Like joint tenancies, tenancies in common may be either in fee, for life, or for a terms of years. The holder of an estate in common has full power of alienation, and such an estate descends to his heirs.

“The common law rule was that all estates,

acquired by purchase, under circumstances which prevented the presence and existence of the so-called four unities, were tenancies in common.

"The general rule at present in this country, is, that all joint estates are held to be tenancies in common, where they are not expressly made joint tenancies, whether acquired by purchase or descent, except in the few localities where tenancy in coparcenary may still exist. In a tenancy in common, the only unity necessary is that of possession. The estates, the titles, and the times of enjoyment may all be different."

SECTION 46. ESTATES BY ENTIRETY.

An estate by entirety was the estate which was formerly created by the gift, conveyance, bequest, or other transfer of real estate to husband and wife. They were said to hold by entireties instead of by moieties. The survivor of the two took the whole estate and there was no way in which this right of survivorship could be defeated. Estates by entirety were abolished in Illinois in 1857.

The Supreme Court of Illinois has held,¹ that a decree of divorce will change an estate by entirety into an estate in common. The contrary doctrine has been held in a number of states.

SECTION 47. ESTATES IN COPARCENARY.

An estate in coparcenary was the joint estate which according to common law, was vested by descent in the heirs of an intestate. Such estates were like tenancies in common in that the doctrine of survivorship did not obtain, but the respective shares of the tenants in coparcenary were inherited by their heirs. The doc-

¹ *Harrer vs. Wallner*, 80 Ill., 197.

trine of coparcenary has never prevailed in this country except in the single state of Maryland.

Coparcenary arose where a person who was seised in fee simple or in fee tail died and his next heirs were two or more females, his daughters, sisters, aunts, cousins, or their representatives. It also extended in gavelkind to all the males in equal degree as sons, brothers, uncles, etc. In either of these cases, all the coparcenaries put together made but one heir.

The right of partition first existed in the case of estates of this character.

SECTION 48. PARTNERSHIP ESTATES.

The rights of an individual partner in lands held by the partnership is an anomalous one. The title must be in members of the firm, or some of them as the Common law does not recognize the existence of a partnership as an artificial person. The right of partner, however, in partnership property is only to his share of the excess of the firms' assets over its liabilities and just what this excess consists of, can never be determined during the continuation of the partnership. Upon the dissolution of a partnership the partners become tenants in common as to the lands owned by the partnership.²

² For a further treatment of this subject see Partnerships, Volume VIII, Subject 33.

CHAPTER VI.

TITLES.

SECTION 49. TITLES.

A title is the method of acquiring and the right of holding an estate in real property.¹

Titles are first divided into original titles and derivative titles. Original titles include those acquired by discovery, occupancy, conquest, or cession. Derivative titles are subdivided into titles by descent and titles by purchase. Titles by purchase are further subdivided into those arising from acts of the parties, and those arising by operation of law. Titles by act of the parties can arise either from deeds or wills. Titles by operation of the law, include those resulting from natural causes, those resulting from political relations, and those resulting from public policy.

¹ According to Lord Coke's definition, *titulus est justa causa possidendi id quod nostrum est*; a title is the means whereby the owner of lands has the just possession of his property. 345 b. infra. But Sir William Blackstone observes, there are several stages or degrees requisite to form a complete title to lands and tenements. The first degree of title is the bare *possession*, or actual occupation of the estate, without any apparent right, or any pretence of right to hold and continue such possession. This may happen when one man disseises another; or where after the death of the ancestor, and before the entry of the heir, a stranger abates, and holds out the heir.

In these cases, the disseisor or abator has only a mere naked possession, which the rightful owner may put an end to, by an entry on the land; but in the mean time, till some act be done by the rightful owner to divest this possession, and assert his title, such actual possession is *prima facie* evidence of the legal title in the possessor; and it may, by length of time, and negligence of him who has the right, by degrees ripen into a perfect and indefeasible title; and in all events, without such actual possession, no title can be completely good. The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the

SECTION 50. ORIGINAL TITLES.

"Original titles rests in some degree on fiction, and denotes that state of ownership beyond which inquiry cannot be made, the land being held in paramount right.

"In its strict definition, original titles is that right by which a person attains property in a thing which at the time of its acquisition is not in the ownership of any other person. In the law of real property this definition must be modified by circumstances. It is

actual possession is in another. Thus, in the case of disseisin or abatement, the right of possession is in the disseisee or heir, who may exert it, whenever he thinks proper, by an entry. And the actual possession is in the disseisor or abator. But this right of possession is of two sorts: an *apparent* right of possession which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. Thus, if the disseisor or other wrongdoer dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to his heir; now, by the common law, the heir has obtained an *apparent* right, though the *actual* right of possession resides in the person disseised; and it shall not be lawful for the person disseised to divest this *apparent* right by mere entry or other act of his own, but only by an action at law; for, until the contrary be proved by legal demonstration, the law will rather presume the right to reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his favour. 2 Bl. Com. 195—7. Gilb. Ten. 21. But if he, who has the actual right of possession, puts in his claim and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became

seised, he will then by sentence of law recover that possession to which he has such actual right. Yet if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession. And by this, the party kept out of possession may have nothing left in him, but the mere *right of property*, or *jus proprietatis*, without either possession or even the right of possession; and this estate is said to be divested and turned to a right. 2 Bl. Com. 197. It is divested because the rightful owner is turned out of possession; and it is turned to a right, because the right of possession, and consequently the right of entry, is lost, and nothing left but the *jus merum*, or mere right of property, which cannot be regained by a possessory, but only by a real action. 3 Cru. Dig. 370. Thus if a disseisor turns me out of possession of my lands, he thereby gains a mere naked possession, and I still retain the *right of possession* and *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of possession; but I still retain the *actual* right both of possession and property. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *actual right* of possession,

difficult to imagine a time when land upon the continents was not subject to some kind of human occupancy and proprietary right, and therefore the law has fixed points beyond which it will not suffer an inquiry to be made. These points mark the initiation of all recognized proprietary interests, and the right by which such interests are held, we call original title.”²

In England the original title to land was in the King. In the United States the original title is in the United States Government, except in the original states,³ and Texas, where the original title to land is in the State governments.

Original title can never be in an individual. Original title may be acquired by a nation in four different ways, namely: by discovery, occupancy, conquest, and cession.⁴

and I retain nothing but the *mere right of property*. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of sixty years. So also if the father be tenant in tail, and discontinues his estate-tail by alienating the lands to a stranger in fee, the alienee thereby gains the *right of possession*, and the son has only the *mere right*, or *right of property*. And hence it will follow, that one man may have the *possession*, another the *right of possession*, and a third the *right of property*. For if tenant in tail enfeoffs A. in fee-simple, and dies, and B. disseises A.; now B. will have the *possession*, A. the *right of possession*, and the issue in tail the *right of property*. A. may recover the possession against B.; and afterwards the issue in tail may evict A., and unite in himself the possession, the right of possession, and also the right of property. In which

union consists a complete title to lands, tenements and hereditaments: for it is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property, which right is then denominated a double right, *jus duplicatum* or *droit droit*. *Infra*, 266 a. And when to this double right the actual possession is also united, when there is, according to the expression of Fleta, *juris et seisinæ conjunctio*, then and then only is the title completely legal. 2 Bl. Com. 299. *Infra*. 266 a.—Note to Thomas Edition of Coke’s Institutes (1836).

² Warvelle on Real Property, pp. 131, and 132, 2nd Edition.

³ Including States formed out of the original States, as Vermont and Maine.

⁴ The methods of acquiring land by a nation will be again referred to under the subject of Public International Law, Vol. XII, Subject 38.

SECTION 51. TITLE BY DISCOVERY.

At one time the mere discovery of land not subject to any civilized nation, was held to vest the title to such land in the nation by whose subjects the discovery was made. This doctrine, however, is now discarded, and discovery, not followed by occupancy will not create title. At the present time, discovery only gives the first right of occupancy.

SECTION 52. TITLE BY OCCUPANCY.

It is universally recognized that the first nation to occupy territory not before owned by any civilized nation acquires a good title thereto. It is held that such occupancy must be effectual, and a country acquires title only to such extent of country as is naturally controlled by the settlements made.⁵

SECTION 53. TITLE BY CONQUEST.

Title by conquest arises where one country takes territory from another by force of arms. In such cases only the title to public lands are affected, private land titles being recognized at the present time. If one nation is entirely conquered, so that no government continues in existence to make peace, or if the war comes to a close by a mere cessation of hostilities without any agreement between the parties, the title is solely one by conquest. Generally, however, title by conquest is confirmed by the treaty of peace at the close of the war, and the title thus becomes in reality one by cession.

⁵ For the Hinterland doctrine recognized in the occupation

of Africa, see Vol. XI, Subject 38.

SECTION 54. TITLE BY CESSION.

Title by cession includes all titles derived by grant from one country to another. As stated in the last section, the cession may be the result of conquest. It may also be the result of a purchase or exchange. At the present day, cessions are made through the medium of treaties, and the methods of making such treaties must be determined by the laws of the individual countries.

SECTION 55. DERIVATIVE TITLES.

Derivative titles include all titles not original. An individual can only hold by a derivative title. The two general classes of derivative title, are title by descent, and title by purchase.

SECTION 56. TITLE BY DESCENT.

Where a person takes land from a relative who dies intestate he takes by descent. Land taken under a will, even if the deceased was the parent or other near relative, is not taken by descent. The main principles of law governing descent are very old and have probably never been so well set out as in the following extracts from Coke's Commentaries:

"Descent, *descensus*, cometh of the Latin word *descendo*, and, in the legal sense, it signifieth, when lands do by right of blood fall unto any after the death of his ancestors; or a descent is a means whereby one doth derive him title to certain lands, as heir to some of his ancestors. And of this, and of that which hath been spoken, doth arise another division of estates in fee-simple, viz., every man, that hath a lawful estate in fee simple, hath it either by descent, or by purchase.

"*Descents*." This word cometh of the Latin

word *descendere, id est, loco superiore in inferiorem movere*' and in legal understanding it is taken when land, &c., after the death of the ancestor is cast by course of law upon the heir, which the law calleth a descent. And this is the noblest and worthiest means whereby lands are derived from one to another, because it is wrought and vested by the act of law, and right of blood, unto the worthiest and next of the blood and kindred of the ancestor; and therefore, it hath not in the common law altogether the same signification that it hath in the civil law; for the civilians call him, *hæredem, qui ex testamento succedit in universum jus testatoris*. But by the common law he is only heir which succeedeth by right of blood. And this agreeth well with the etymology of the word (heir) to whom the lands descend, for *hæres dicitur ab hærendo, quia qui hæres est haeret, hoc est, proximus est sanguine illi cujus est hæres*. So as he that is *hæres, sanguinis, est haeres, et heres haereditatis*.

"And the learning of degrees set out in the civil and canon law (wherein I find some difference) is worth the knowledge, to the end that Littleton and the law may the better be understood, which I will divide into certain rules; whereof the first is:

"That a person added to a person in the line of consanguinity maketh a degree. And it is to be understood, that a line is threefold, viz., the line ascending, descending, and collateral. And first, for example, of the ascending line, take the son and add the father, and it is one degree ascending; add the grandfather to the father, and it is a second degree ascending.

"So as how many persons there be, take away one, and you have the number of degrees. If there be four persons it is the third degree, if five the fourth,

for one must exceed, and then you have the degree. Likewise by the descending, take the father and add the son, and it is one degree; then take the son and add the grandchild, and it is the second degree; and so likewise further. Wherein observe that the father, son, and grandchild, albeit there are three persons, yet they make but two degrees, because (as it hath been said) one must exceed for making a degree.

“It is to be noted, that in every line the person must be reckoned from whom the computation is made. And there is no difference between the canon and civil law in the ascending and descending line; for those whom the civilians do reckon in the second degree, the canonists do reckon in the first; and those whom they place the fourth, these place in the second. Therefore, if we will know in what degree two of kindred do stand according to the civil law, we must begin our reckoning from one, by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appear in what degree they are. For example, in brothers’ and sisters’ sons, take one of them and a second to his father, there is one degree; from the father to the grandfather, that is the second degree; then descend from the grandfather to his son, that is the third degree; then from his son to his son, that is the fourth. But by the canon law there is another computation, for the canonists do ever begin from the stock, namely, from the person of whom they do descend; of whose distance the question is. For example, if the question be, in what degree the sons of two brothers stand by the canon law, we must begin from the grandfather and descend to one son, that is one degree; then descend to his son, that is another

degree; then descend again from the grandfather to his other son, that is one degree; then descend to his son, that is a second degree; so in what degree either of them are distant from the common stock, in the same degree they are distant between themselves; and if they be not equally distant, then we must observe another rule. In what degree the most remote is distant from the common stock, in the same degree they are distant between themselves; and so the most remote maketh the degree. *Gradus dicitur a gradiendo, quia gradiendo ascenditur et descenditur.* And thus much of the civil and canon law is necessary to the knowledge of the common law in this point."

It is to be noted that the Common law rule and the Canon law rule for determining the degree of relationship existing between two collateral relatives was the same, and that both differed from the Civil law rule. The Civil law rule on this point has been adopted in this country.

The following are Blackstone's famous seven canons of descent:

1. Inheritances shall lineally descend to the issue of the person who last died actually seized, but shall never lineally ascend. Actual seisin is necessary. Thus, if A should die leaving two sons, B, the elder, C, the younger, and B should die, never having been actually seised, C, the younger son, would inherit to the exclusion of B's heirs, as being the heir of A, the person last actually seised.

2. Male issue shall be preferred to female. A dies leaving three daughters and one son. The son inherits the whole estate to the exclusion of the daughters.

3. Where there are two or more males in equal

degree, the eldest only shall inherit; where there are two or more female heirs in the same degree, they take as co-partners, and share and share alike.

4. The lineal descendants of any person deceased shall represent their ancestor, i. e., shall stand in the same place that the person himself would have stood, had he been living.

5. On the failure of lineal descendants of the person last seised, the inheritance shall descend to his collateral relations.

6. The collateral heir of the person last seised must be his next collateral kinsman of the whole blood. The half-blood, at common law, could never inherit.

7. In collateral inheritances, kindred derived from male ancestors, however remote, shall be admitted before those derived from female ancestors, however near.

Some of these canons, particularly the first three and the last, have been changed by statute in many of the States, the subject of descent now being entirely regulated by State statutes in this country.

SECTION 57. TITLE BY PURCHASE.

Title by purchase covers all methods of acquiring property other than by descent. The word "purchase," therefore, is used here in a much broader significance than in its ordinary use. There are many divisions and subdivisions of title by purchase and these will be considered in the following sections.

SECTION 58. TITLE THROUGH ACT OF THE PARTIES.

Titles through the act of the parties includes title derived from a deed and title derived from a will.

Ownership of nearly all the land in the country is derived through this general division. Title by deed or by grant (as it is otherwise called) is subdivided into public grant and private grant. This classification is based upon the character of the grantor; a public grant being one from the government, and a private grant one from an individual.

SECTION 59. PUBLIC GRANT.

In this country land belonging to the public can only be granted away by authority of the legislative department. Such authority can be given by the legislative department of the United States or of a particular State in one of two ways: First, there may be a special legislative act expressly transferring certain land to certain parties; or second, there may be a general legislative act providing how individuals in general may acquire title to a portion of the public lands. In the first class of cases the legislative act will serve as evidence of the title and no deed or patent is generally given. All persons acquiring title from the government under a general legislative act receive a patent from the government.

“A patent is a complete appropriation of the land it describes, and passes to the grantee, or, as he is sometimes styled, the patentee, all the interest of the State or the United States, whatever it may be, in everything connected with the soil, or forming any portion of its bed, or fixed to its surface; in short, in everything embraced within the term “land.” It is conclusive evidence of the right of the patentee to the land described therein, not only as between himself and the government, but as between himself and a third person who has not a superior title from a source

of paramount proprietorship. When issued to a confirmer of a foreign grant, it operates like the deed of any other grantor, and passes only such interest as the government possessed, the deed taking effect by relation from the initiation of the series of proceedings for confirmation, and of which it forms the last act.”⁶

SECTION 60. PRIVATE GRANTS.

A deed is a conveyance of lands from one individual to another. Deeds may be either voluntary or involuntary. A voluntary deed is one made in pursuance of an agreement between the parties; an involuntary deed is one made under an order of court. The various forms of conveyances,⁷ and the constituent parties of a deed⁸ will be discussed later in this subject.

Where an individual transfers property to the public, such a grant is called a dedication. Such a dedication may be either a statutory dedication, in which case, the exact provisions of the statutes must be followed, or a common law dedication which requires no particular formalities.⁹

A dedication may convey either the fee or only an easement.

⁶ Warvelle on Real Property, pp. 160, and 161, 2nd Ed.

⁷ See Chapter X.

⁸ See Chapter VII.

⁹ “Dedications are susceptible of several classifications. The first, and most general, is a division into express and implied; the former being where the act is performed by deed or other writing, vote, overt acts, or declarations; the latter rests on a presumption, and results from acquiescence in the public use. A further distinction is made in the United States between common-law and statutory dedications, and

some writers make this the primary classification; but a critical examination will demonstrate that statutory dedication is but one form of express dedication, and differs from a common law dedication, not so much in the method of performance as in its effect. A third distinction exists between dedications absolute and to specific uses, and by far the greatest amount of litigation which has attended this branch of the law has originated in questions growing out of this distinction.”

SECTION 61. DEVISE.

The right of owner of land to dispose of it by will is a comparatively late addition to the common law. This right of willing away land, while existing in England during the Anglo-Saxon period, was taken away at the time of the Norman Conquest. The statute of Wills (1540) gave to landowners the power of alienation by will of all land held in socage and two-thirds of the land held in chivalry. In 1660 all distinction between estates in chivalry and socage were swept away and a landowner thus acquired the complete right to dispose of all of his land by will.¹⁰

Wills disposing of real estate must be in writing, and various formalities in the making of wills are provided by the statutes of the various states.¹¹ The validity of a will so far as it concerns any particular piece of real property is determined by the law of the place where the land is situated.

The title to lands devised rests in the devisee immediately upon the death of the testator.

SECTION 62. EXECUTORY DEVISES.

The rules governing transfers of land by devise are much more liberal and elastic than those governing such transfers by deeds. Certain estates which would be void if created by deed are valid when created by a will. Estates of this character are known as executory devisees.

¹⁰ England and the United States are practically the only countries where this right exists to such a complete extent. In countries whose laws are based upon the Roman or civil law, a certain portion of the land owned by a testator must go

to his wife or children, if any. For an illustration, of such provision, see the subject of Spanish-American Law, Vol. XII, Sub. 40.

¹¹ See statutes of particular States and also subject of Wills, Vol. X, Subject 32.

“Before the close of this chapter, it may be proper to advert to the doctrine of Executory Devises; which seems to have originated in the indulgence shown to testators in effectuating their intentions, whereby the judges were induced in cases of wills, as well as in limitations of uses, to dispense with the strict rules of the common law, according to which no remainder could be limited over after an estate in fee-simple, nor a freehold be created to commence *in future*. An executory devise, or bequest, therefore, is such a limitation of a future estate or interest in lands or chattels, as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. Fearn. Exec. Dev., 4.

There are three kinds of executory devises; the 1st is, where the devisor disposes of the whole fee, but upon some future contingency qualifies that disposition, and devises the estate over to some other person, 23 Eliz. Dyer, 127 a. Hoe vs. Gerils, cited Palm., 136. Pells vs. Brown, Cro. Jac., 590; Hanbury vs. Cockerill, 1 Rol. Abr., 835; Heath vs. Heath, 1 Bro. C. C., 147; Doe vs. Weston, 2 Bos. & P., 324. And though the first estate be not vested, but contingent, yet, if the ulterior devise is limited so as to take effect in defeazance of the estate first devised, on an event subsequent to its becoming vested, it will be deemed an executory devise. Gulliver vs. Wicket, 1 Wils., 105. But it is a settled rule of law that no devise is deemed executory, which can be supported as remainder. 2 Bos. & P., 298; Denny, d. Agar, vs. d. Agar 12 East., 253; Crump vs. Norwood, 2 Marsh., 161; Romilly, knt. vs. James, 6 Taunt., 263. It may be further observed, that an executory devise cannot be barred. Pells vs. Brown, *supra*. Mullinix's case, cited Palm., 136; Anto, vol. 1, p. 515,

516, n. (7). And therefore, in order to prevent their being used as a means of creating perpetuities, it was established, that an executory devise must vest within the compass of a life, or lives in being, and twenty-one years and nine months after. *Pells vs. Brown, supra.* *Fairfax vs. Heron, Prec. in Ch.*, 67; *Taylor, d. Smith vs. Biddall*, 2 Mod., 289; *Stephens vs. Stephens, Forr.*, 228; *Leake vs. Robinson*, 2 Meriv., 363. For the principle on which these limits have been fixed, see Mr. Hargrave's second argument in the *Thelluson* causes, p. 57; ante, vol. 1, p. 515-516, n. (7). A devise after a general failure of heirs or issue, is too remote, 6 Cru. Dig., 449; and we have seen, that the words "dying without issue," or "without leaving any issue," are construed, as to the freehold, to mean a dying without issue *generally*, by which there may be *at any time* a failure of issue, ante, vol. 1, p. 548, n. (N); though as to the personal estate it is different, for there the same words shall be construed to mean a dying without *leaving* issue *at his death*; the reason of which difference in the case of personalty is, in order to support the devise over, which otherwise would be too remote. *Forth vs. Chapman*, 1 P. Wms., 663; *Atkinson vs. Hutchison*, 3 P. Wms., 261; *Southby vs. Stonehouse*, 2 Ves., 615; *Earl of Stafford vs. Buckley, Ibid.*, 180; *Exel v. Wallace, Ibid.*, 120; *Read vs. Snell*, 2 Atk., 616; *Sheffield vs. Lord Orrery*, 3 Atk., 288; *Dansey vs. Griffiths*, 4 Maul. & S., 61; *Crooke vs. De Vandes*, 9 Ves., 197, 203. The reason wherefore, in the case of a devise of lands of inheritance to one, or to one and his heirs and *if he die without issue*, then to another, the subsequent words, "if he die without issue," shall either reduce or enlarge his estate to an estate-tail, is, because they are supposed to be inserted

in favour of the issue, that they shall have it; and the intent shall take place. S. C. 4 Maul. & S., 62. In the case of a devise in fee, with an executory devise over, curtesy attaches on the first estate, and is not defeated by its determination. Buckworth vs. Thirkell, 1 Collec. Jur., 332; Ante, vol. 1, p. 561, n (g).

The 2d sort of executory devises, is that of a devise of a freehold estate to commence *in futuro*; as where the devisor, without departing with the immediate fee, gives a future estate, to arise either upon a contingency, or at a period certain, unprecedented by, or not having the requisite connexion with, any immediate freehold; to give it effect as a remainder. Fearn. Ex. Dev. 4th ed., 17, 24. Pay's case, Cro. Eliz., 878. Clarke vs. Smith, 1 Lutw., 798; 1 Freem., 244; 1 Wils., 206. Devises of this sort are sometimes supported as remainders. See Purefoy vs. Rogers, 2 Saund., 380; Doe, d. Mussell vs. Morgan, 3 T. R., 763. And wherever the first devise can be construed to pass an estate-tail only, the devise over will be deemed a remainder expectant on the determination of that estate-tail, and not an executory devise. Spalding vs. Spalding, Cro Car., 185; Wealthy vs. Bosville, Rep. Temp. Hardw., 258; Doe, d. Mussell vs. Morgan, *supra*; Ante, vol. 1, p. 547, 8 n. (w). Executory devises of this sort must vest within the same time, as was mentioned to be prescribed for those of the first kind. But it should be observed, that "by the time of vesting," is meant, the vesting of the freehold. For although land should be limited for a long term of years, with the remainder to the unborn son of a person then living, this executory devise to such unborn son would be good; because the vesting of the freehold is confined to the period of a life in being; for upon

the birth of such son, the freehold will vest in him; or, upon the death of such person without any son, it must vest somewhere else, subject only in either case to the preceding term. *Gore vs. Gore*, 2 P. Wms., 28. When an estate is devised to a person upon an event, which is too remote; a devise over, depending on the same event, is also void. *Proctor vs. Bishop of Bath*, 2 Hen. Bl., 358; *Earl of Chatham vs. Tothill*, 6 Bro. P. C., 451; 1 Ves., 134. So a devise after failure of the issue or heirs of A., where no estate-tail is already vested or given by the express words of the will, or arises by implication, to such issue or heirs, is void in its creation; for if A. should have heirs or issue, they might last for ever; and, while they did, there would be nobody who could bar the estate thus devised, so that a perpetuity would be created. *Dougl.*, 506, n. *Wright vs. Hammond*, 8 Vin. Ab., 110.; 1 Stra, 427; *Lanesborough vs. Fox*, 3 Bro. P. C., 130; *Goodman vs. Goodright*, 1 Bl. Rep., 188; *Dougl.*, 507. But though in general a devise after a general failure of heirs or issue, is void, yet this rule admits of some exceptions: As, 1st, where a person who is entitled to a reversion expectant on the determination of an estate-tail, devises the lands to another, after failure of issue of the tenant in tail; this is held to be an immediate devise of the reversion, and therefore good. *Badger vs. Lloyd*, 1 Ld. Raym., 523; 1 Salk., 232; *Fearn. Ex. Dev.*, 326; *Jones vs. Morgan*, 3 Bro. P. C., 322; *Lytton vs. Lytton*, 4 Bro. C. C., 441. 2d. A devise in default of issue of the devisor: which has been construed to be a conditional devise, to take effect at the death of the testator, and has therefore been held not to be executory. *Willington vs. Willington*, 1 Bl. Rep., 645; *French vs. Cadell*, 3 Bro. P. C.,

257. 3d. A devise over for life, to a person *in esse*, to take place on failure of issue of the first devisee, may be good; because, the future limitation being only for the life of a person *in esse*, it must necessarily take place during that life, or not at all: and therefore the failure of issue, in that case, is confined to the compass of a life in being. Fearn. Ex. Dev., 279; Doe vs. Lyde, 1 T. R., 593. 4th. Where an estate-tail is raised by implication, in the person, on the failure of whose heirs or issue the estate is devised over: in which case the second devise is supported as a remainder, expectant on the determination of such prior estate-tail. Walter vs. Drew, Com. Rep., 372; Jones vs. Morgan, *supra*; Ante, vol. 1, p. 547, 8 n. (N).

“3d. With respect to executory devises of terms for years:—A bequest over of a term for years, after a previous disposition for life, was formerly void; because, an estate for life being of greater estimation in the eye of the law than the longest term for years, it was concluded, that the limitation of a term for years, to a person for life, was a complete disposition of it; and it was also considered that the possibility of a term’s continuing longer than the life of the person, to whom it was first bequeathed, was not such an interest as by the rules of law could be limited over. 1 Burr., 284. But such bequest is now good. 6 Cru. Dig., 476, 477; Matthew Manning’s case, 8 Co., 95; Lampet’s case, 10 Co., 46. And in like manner a similar declaration of a trust of a term, is good. 1 Burr., 284; 1 Vern., 235. And though to a person not *in esse*, or not ascertained. Cotton vs. Heath, 1 Rol. Abr., 612; 1 Ab. Eq., 191. Although a devise of a term for years to a person and the heirs of his body, vests the entire and absolute property of the term in him, if not restrained

by subsequent words; yet, if a devise over of it is made, which is within the rules established for preventing perpetuities, it will be supported as an executory devise. And the devisee for life cannot bar the devise over; nor will any subsequent union of the freehold or inheritance, with the interest so given to the first devisee, or a feoffment, or other act of forfeiture, by such first devisee, extinguish or affect the interest of the ulterior devisee. Fearn. Ex. Dev., 55; Hamington vs. Rudyard, cited 10 Rep., 52 a; Cotton vs. Heath, *supra*. But an executory bequest of a term for years, as well as executory devises of estates of inheritance, must vest within the compass of a life or lives in being, and twenty-one years and some months after. Therefore where a term for years is given over, after a general and indefinite failure of issue, it is void, as being too remote. Burford vs. Lee, 2 Freem., 210; Love vs. Windham, 1 Mod. 50. And such limitations cannot be supported as remainders. 6 Cru. Dig., 481. But where there are words to restrain the failure of issue to a life or lives in being, and twenty-one years and some months after, it is good. Duke of Norfolk's case, 3 Ch. Ca., 1; Pollexf. 223; Lamb vs. Archer, 1 Salk., 225; Fletcher's case, 1 Ab. Eq., 193; Long vs. Blackall, 7 T. R., 100. And the court of chancery has very much inclined to lay hold of any words in a will, to restrain the generality of the words "dying without issue," and confine them to dying without issue living at the time of the person's decease, in order to support the intention of the testator; by which construction the devise over becomes valid, being confined to the period of a life in being. Torget vs. Gount, 1 P. Wms., 432; Forth vs. Chapman, 1 P. Wms., 663; Atkinson vs. Hutchinson, 3 P. Wms.,

258; *Goodtitle vs. Pegden*, 2 T. R., 720; *Wilkinson vs. South*, 7 T. R., 555. But, in devises of terms, there is no distinction between words giving an express estate-tail, or by implication, *Fearn. Ex. Dev.*, 233; 1 P. Wms., 433; 3 P. Wms., 268; nor between a devise to one for life expressly, and if he die without issue, remainder over; or to one indefinitely, and if he die without issue, remainder over. *Love vs. Windham*, *supra*; *Clare vs. Clare*, *Forrest*, 21; *Fearn. Ex. Dev.*, 275. An executory devise of a term for life to a person *in esse*, to take place upon a dying without issue of another, is good; because, the future limitation being only for the life of a person *in esse*, it must necessarily take place during the life or not at all; and therefore the failure of issue is, in that case, confined to the compass of a life in being. *Oakes vs. Chalfont*, *Pollexf.* 38; *Et vid.*, 3 *Atk.*, 449; *Doe vs. Lyde*, 1 T. R., 593.

“With regard to executory devises in general, it may be further observed, that, where one limitation of a devise is executory, all the subsequent ones are so likewise. *Fearn. Ex. Dev.*, 334; *Carth.*, 310; *Gore vs. Gore*, 2 P. Wms., 28. A preceding executory limitation may, however, be uncertain and contingent; when a subsequent one, though to take effect in future, may not be uncertain or conditional (otherwise than in respect of the possibility of its expiration before the former vests or fails); but may be so limited as to take effect either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. In either of those cases it must vest at the time appointed for the preceding limitation to vest; for, should the preceding limitation fail of taking effect, the subsequent one will then vest in possession, should the preceding take effect, the

subsequent one will at the same time vest in interest as a remainder upon the preceding one, and then become liable to the same modes of destruction, to which other remainders of the same kind are subject. *Brownsword vs. Edwards*, 2 Ves., 243; *Southby vs. Stonehouse*, 2 Ves., 610. A distinction must, however, be made between cases of this nature, and the case where a testator devised to B., his son and heir; and if he died before twenty-one, and without issue of his body, then living, the remainder over, &c. B. survived the twenty-one years, and then sold the lands and died; and it was held, that he had a fee-simple immediately; for the estate-tail was limited to arise upon a contingency subsequent. *Collinson vs. Wright*, 1 Sid., 148. And also, where a person devised lands to his wife till his son came of age; and then that his son should have the land to him and his heirs; and if he died without issue before his said age, then to his daughter and her heirs; this was held to be a good executory devise to the daughter, if the contingency happened; and if he lived to twenty-one, though he after died without issue, or left issue though he died before twenty-one; yet the daughter was not to have the land, because he was to die without issue and before twenty-one, or else the daughter could not take. *Et vid. acc. Eastman vs. Baker*, 1 Taunt., 174. It is observable, that, in the two cases which have been last stated, the devise to the son was in fee, so as not to admit a regular remainder after it: whereas in that of *Brownsword vs. Edwards*, the first devise was in tail, upon which Lord Hardwicke laid so much stress as to say, that had the devise been to B. and his heirs, the construction he gave could not, he believed, be made; for where there was such a contingent

limitation, he did not know that the court had changed the word "heirs" into "heirs of the body," to make it so throughout. Fearn. Ex. Dev., 6th ed., 389-392. With respect to this class of cases, it may be remarked, that a devise to the heir at law in fee, with an executory devise over in case he does not attain twenty-one years of age, does not alter the quality of the estate, which he would otherwise have taken as heir; but he takes by descent, and not by purchase; and the defeasibility of the estate, upon the happening of the event which was contemplated by the will, makes no difference. Doe, d. Pratt vs. Timons, 1 Barn. & A., 350; Et vid. Chaplin vs. Leroux, 56 Geo., 3, cited *ibid.*, 541; Buckworth vs. Thirkell, 3 Bos. & P., 652, n."¹²

The subject of executory devisees was thus discussed by the Court in the case of Hopkins vs. Hopkins:¹³

"Two questions have been made upon this will; the first is, whether this limitation to the first and every other son of John Hopkins can now take effect as an executory devise, or whether it shall be taken as a contingent remainder, and consequently void for want of a particular estate to support it, by reason of Samuel's death in the testator's lifetime, and that John Hopkins had no son *in esse* at the testator's death, in whom the remainder might vest. The next question is, in case the limitation be taken as an executory devise, what is to become of the rents and profits of this estate until John Hopkins has a son. As to the first, I think it impossible to cite any authorities in point. None have been cited. It seems to be allowed, that if things had stood at the testator's

¹² Note to Thomas' Edition of Coke's Institute (1836).

¹³ Reported Cas. Temp. Talb. 44 1734.

death as they did at the time of the making of the will, the limitation in question would have been a remainder by reason of Samuel's estate, which would have supported it; so is the case of *Purefoy vs. Rogers*, 2 Saund., 380, 388, and limitations of this kind are never construed to be executory devises, but where they cannot take effect as remainders. So, on the other hand, it is likewise clear, that had there been no such limitation to Samuel and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it; and consequently not able to inure as a remainder; so that it must be the intervening accident of Samuel's death in the testator's lifetime, upon which this point must depend. And as to that, I am of opinion, that the time of making the will is principally to be regarded in respect to the testator's intent. If an infant or feme covert make a will, and do not act either at full age or after the coverture determined, to revoke this will, yet the will is void; because the time of making is principally to be considered; and the law judges them incapable of disposing by will at those times. The same reason holds in the case of a devise of all the lands which a man has or shall have at the time of his death, no after-purchased lands shall pass without a republication; which was the case of *Bunter vs. Cook*, 1 Salk., 237, because the time of the will made is chiefly to be regarded. Indeed, it is possible that subsequent things may happen to alter the testator's intent; but unless that alteration be declared, no court can take notice of his private intent, not manifested by any revocation of the former; though these subsequent accidents may, and must in many cases, have an operation upon the will; as in the case of *Fuller vs.*

Fuller, Cro. Eliz., 422, and Hutton and Simpson, Vern., 722. And in the Lord Landsdown's Case, the first limitation did not expire by effluxion of time, but by the intervening alteration of things between the time of the will made and the testator's death; and the words there, for want of such issue, were not construed to create another estate-tail to postpone the limitation, but only to covert the second estate to the precedent limitation. So, we see, that in these cases, the method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired; but to let it work as far as it can. And if, in this case, we consider it as an executory devise, the intent will be served in case John Hopkins has a second son; but if it is taken as a remainder, the intent plainly appearing that a second son of John Hopkins should take, is quite destroyed; there being no precedent estate to support it as a remainder. The very being of executory devises shows a strong inclination, both in the courts of law and equity, to support the testator's intent, as far as possible; and though they be not of ancient date, yet they are of the same nature with springing uses, which are as old as uses themselves. I can see no difference between this case and the others of like nature, that have been adjudged. And if such a construction may be made consistently with the rules of law, and agreeable to the testator's intent, it would be very hard not to suffer it to prevail. In Pay's Case, Cro. Eliz., 878, had the testator lived to Michaelmas, the limitation had been a remainder; and if a remainder in its first creation does, by any subsequent accident become an executory devise, why should it not be good here, upon the authority of that case, whereby the testator's

death before Michaelmas, what would otherwise have been a remainder was held to be good by way of executory devise? I think, that in this case the limitation would operate as an executory devise, if it was of a legal estate; and therefore shall do so as a trust, the rules being the same.

“The next question is, what is to become of the rents and profits in case this be taken to be an executory devise, until the birth of a son to John Hopkins? And this must depend upon the wording of the proviso. The words are, ‘That none of the persons to whom the estates are limited shall be in the actual possession and enjoyment of the rents and profits until they shall respectively attain the age of twenty-one; and that in the meantime the trustees shall make such allowance thereout as they shall think suitable; and then he wills, that the overplus of such rents and profits do go to such persons as shall be entitled unto, and come to the actual possession of his estate,’ etc. By which words, none are affected but such as are to come to the estate under the limitations. It restrains them from having anything to do with the estate till they attain the age of twenty-one, and provides the surplus (beyond their allowance) to be laid up for them; but here is no provision made, what shall become of those rents and profits until a son be born. The words in the meantime have been differently construed; and it was said, that there was no certain terminus a quo, from whence they should begin. Had Samuel lived, the terminus must have been from the time of the limitation taking place; and so it must be *toties quoties* and come to be entitled to this estate under the several limitations; but until somebody is in ease to take under this executory devise, the rents and profits must be

looked upon as a residue undisposed of and consequently must descend upon the heir-at-law; the case being the same where the whole legal estate is given to the trustees, and but part of the trust disposed of, as in this case; and where but part of the legal estate is given away, and so the residue undisposed of, the legal estate descends upon the heir-at-law. So it was held by the Lord King in the case of Lord and Lady Hertford vs. Lord Weymouth; which shows that equity follows the law."

SECTION 63. TITLES BY OPERATION OF LAW.

There are a number of cases where the title to land comes to a person as a result of the operation of law. Such cases are divided into three general classes as follows: (1) those arising from natural causes; (2) those arising from civil or political relations, and (3) those arising from public policy.

SECTION 64. TITLES ARISING FROM NATURAL CAUSES.

Title is said to arise from natural causes in the cases of accretion and reliction. Accretion is the increase of land caused by gradual and imperceptible additions thereto caused by the washing of the sea or adjacent stream. Reliction is the gradual subsidence of waters leaving dry land where there had formerly been water. The land created either by accretion or reliction belongs to the adjacent owner.

The sudden removal or deposit of land by the perceptible action of water is called avulsion. The title to land cannot be changed or created by avulsion.

SECTION 65. TITLES ARISING FROM CIVIL OR POLITICAL RELATIONS.

Under this division are included the subjects of eminent domain, escheat, confiscation, and forfeiture.

Eminent domain is the right possessed by the government to take property for public use, upon giving due compensation, or to authorize such a taking by a corporation or individual engaged in a quasi-public occupation. The subject of eminent domain has already been treated under the subject of Constitutional Law.¹⁴

Escheats is the right of the government to take the property of an intestate who dies without leaving any heirs to inherit.

Confiscation is the right of a government to take the property of its enemies in time of war. This right is mainly, but not entirely confined to the case of personal property.

"The term forfeiture, when employed to designate a method of acquiring title, has several distinct meanings. In its primary signification it is the means whereby the property of the citizen inures to the state by reason of the violation of law or neglect of legal duty. In the United States this occurs only in case of attainder of treason or non-payment of taxes. In either case it is in the nature of a penalty, and results as an incident of our reciprocal duties and obligations. In England attainder of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted to the disinheritation of his heirs. When the Federal Constitution was framed, this was felt to be a great hardship, if not a positive injustice, and, for this reason, it was ordained that no attainder of treason should work corruption of blood or forfeiture of estate, except during the life of the person attainted. A forfeiture for non-payment of taxes is based upon the principle that every owner of lands holds his estate

¹⁴ See Vol. II, Subject 3, Section 89.

upon the implied condition that he will promptly pay his share of the common burdens assessed against the entire community, and if he fails to comply with this condition, and his estate is offered at public sale, for such delinquency, and no purchaser can be found for it, the title is transferred from the owner to the State, the latter being always ready to bid for the land when no other bidder appears."¹⁵

The subject of tax titles is regulated by statutes in the several states. The law looks with disfavor upon tax titles, and will, whenever possible, set them aside upon the repayment of the amount of the taxes with interest and costs.

SECTION 66. TITLES ARISING FROM PUBLIC POLICY.

Under this heading there are to be considered the subjects of prescription and limitation.

Prescription is the method of acquiring title by the continued occupancy of a piece of property for a certain period, even if such occupancy was in its origin without right. To secure title in this manner the occupancy may have been open, notorious, uninterrupted, and hostile to the rights of the true owner.

A statute of limitations is one providing that no action shall be brought upon a cause of action after the lapse of a certain period.

In order that the statute may operate against the right of recovery of real property, the possession must have been adverse for the entire period of limitation. There must not only have been an actual and complete disseisin, but such disseisin must be continuous and uninterrupted during the statutory period. The adverse possession need not, however, be continuous in one person. The Title may be assigned, and it

¹⁵ Warvelle on Real Property, pp. 186-7, 2nd Ed.

descends to the disseisor's adverse heirs. If two or more disseisors hold successively and in privity with each other, whether by purchase or descent, and their several periods of holding make up the requisite statutory period, the owner will be effectually barred. In some states, however, it is held that the holding must be continuous by a person or his heirs for the statutory period. The statute runs against the rightful owner and all other persons standing in privity with him. The statute begins to run against the person only from the time that he has a right to bring action.

CHAPTER VII.

CONVEYANCE OF REAL PROPERTY.

SECTION 67. GRANTORS AND GRANTEES.

In every valid transfer of real property there must be a grantor competent to give and a grantee capable of taking. Every person of legal age and sound mind is competent to grant away any estate in land of which he may be the owner. All persons, both natural and artificial are capable of taking as grantees in the absence of statutory prohibitions. The statutory prohibitions upon the taking or holding of land, are confined in this country, to the cases of corporations and non-resident aliens.¹

SECTION 68. REQUISITES OF A DEED.

The requisites of a deed were thus enumerated by Lord Chief Justice Coke;

“This word (deed) in the understanding of the common law is an instrument written in parchment or paper, whereunto ten things are necessarily incident; viz.; First, writing. Secondly, in parchment or paper. Thirdly, a person able to contract. Fourthly, by a sufficient name. Fifthly, a person able to be contracted with. Sixthly, by a sufficient name. Seventhly, a thing to be contracted for. Eighthly, apt words required by law. Ninthly, sealing. And tenthly, delivery. A deed cannot be written upon wood, leather, cloth, or the like, but only upon parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted.”²

¹ See statutes of the several states.

² Coke's Institutes, Vol. II, p. 232.

This enumeration is substantially correct at the present time.

SECTION 69. THE WRITING AND THE MATERIAL.

Under the old method of transfer of land by feoffment³ no writing, of course, was, or could be, required. Under the new system of deeds which grew out of the Statute of Uses, written deeds became necessary. The Statute of Frauds (enacted half a century after the time of Coke) expressly required deeds of land to be in writing.

The requirement that the deed must be written upon either paper or parchment has been somewhat modified. It is now sufficient if the deed be written upon either of these materials or upon any other material equally or more durable.

SECTION 70. CONSIDERATION IN A DEED.

A consideration was not necessary in conveyances under the common law, but was held to be necessary to the validity of a deed of bargain and sale.⁴ At the present time, the only practical effect of a consideration in a deed is to prevent a resulting trust.

SECTION 71. PARTS OF A DEED.

Coke enumerates the eight parts of a deed as follows: "There have been eight formal or orderly parts of a deed or feoffment, viz.; 1. the premises of the deed implied by Littleton, (section 1), 2, the habendum, whereof Littleton (section 1) speaketh; 3, the tenendum, mentioned by Littleton; 4, the reddendum; 5, the clause of warranty, 6, the incujus rei testimonium, comprehending the sealing; 7, the date of the deed, containing the day, the month, the year, and stile

³ See Section 86.

⁴ See Section 88.

of the king, or of the year of our lord; lastly, the clause of his testibus; and yet all those parts were contained in very few and significant words, *haec fuit candida illius aetatis fides et simplicitas, quae pauculis lineis omnia fidei firmanento posuerunt.*"⁵

The eight parts of a deed, as generally given at the present time, differ a little from the above list, and are as follows: (1) the premises, (2) the habendum; (3) the tenendum; (4) the reddendum; (5) the conditions; (6) the covenants; (7) the warranty; (8) the conclusion.

—“The office of the premises of the deed is two-fold; first, rightly to name the feoffer and the feoffee; and secondly, to comprehend the certainty of the lands or tenements to be conveyed by the feoffment, either by express words, or which may by reference be reduced to a certainty; for *certum est quod certum reddi protest*. The habendum hath also two parts, viz., first, to name again the feoffee; and secondly, to limit the certainty of the estate.

“If in the premises lands be letten, or a rent granted, the general intendment is, that an estate for life passeth; but if the habendum limit the same for years, or at will, the habendum doth qualify the general intendment of the premises. And the reason for this is, for that it is a maxium in law that every man's grant shall be taken by construction of law most forcible against himself.

“If a lease be made to two, habendum to the one for life, the remainder to the other for life, this doth alter the general intendment of the premises, and so hath it been oftentimes resolved. And so it is if a lease be made to two, habendum the one moiety to the

⁵ Coke's Institutes, Vol. II, p. 195.

one, and the other moiety to the other, the habendum doth make them tenants in common; and so one part of the deed doth explain the other, and no repugnancy between them.

“The date of the deed many times antiquity omitted; and the reasons thereof was, for that the limitation of prescription, or time of memory, did often in process of time change, and the law was then holden, that a deed bearing date before the limited time of prescription, was not pleadable; and therefore they made their deeds without date, to the end they might allege the, within the time of prescription. And the date of the deed was commonly added in the reign of E. 2 and E. 3, and so ever since.”⁶

The importance of the habendum and tenendum clauses of the deed have greatly decreased, until these clauses are to-day often merely represented by the words, “to have and to hold.” The conditions in a deed have already been treated in a previous chapter.⁷

SECTION 72. COVENANTS AND WARRANTY.

“Among the classes usually inserted in deeds there are a number of stipulations in the nature of collateral promises of the performance or non-performance of certain acts, or of agreements that a given state of things does or shall, or does not or shall not, exist, which are technically known as covenants. When relating to title, they are inserted for the purpose of securing to the grantee the benefit of the title which the grantor professes to convey, and as an indemnity against any loss that may arise in consequence of any impairment of defect of such title. By statute the employment of certain operative words of grant

⁶ Coke's Institutes, Vol. II, p. 195,
197.

⁷ See Chapter III.

are also given the force of limited covenants for certain purposes.”⁸

There are five so-called *common covenants*, which accompany nearly every deed, and which are presumed under the law of most states. These five common covenants, are those of *seizin*, *good right to convey*, that the land is free from all *incumbrances*, for *quiet enjoyment*, and *general warranty*.

A covenant is said to run with the land when the right of action thereon will pass to any assignee of the land.⁹

SECTION 73. SIGNING AND SEALING.

A seal was always required to any written deed under the common law, but signing was unnecessary prior to the passage of the Statute of Frauds. At the present time every deed must be signed and sealed. Unless expressly so required by statute the signature need not be at the end of the deed, and in most states a mere scroll on the paper is a sufficient seal. A person who cannot write may substitute his mark for his signature.

SECTION 74. ATTESTATION AND ACKNOWLEDGMENT AND REGISTRATION.

Attestation of a deed was not necessary at common law, and is not necessary in this country except where made so by statute. The Common law made no provision for the registration of deeds, and even to-day in England registration is required in only two countries in that country. Each of the states in this country have a complete system of registration. The failure to registry a deed will not invalidate it as be-

⁸ Warvelle on Real Property, page 273.

⁹ For a complete discussion of the

subject of covenants, the student is referred to Warvelle on Real Property, pages 273, 282.

tween grantor and grantee, but such registration is necessary to protect the grantee against the claims of third parties.

“In most of the states, in order that a deed may be recorded, and furnish constructive notice to subsequent purchasers, it must be acknowledged and proved before some officer authorized to take such acknowledgments, and the certificate of acknowledgment must be endorsed, in the deed. And it is also provided by statute in some states that a transcript of the record of a duly acknowledged deed will be received as primary evidence of the contents of such instrument in the courts of those states, without further proof thereof. It must be observed that the acknowledgment is intended to evidence the due execution of the deed and not to supply any of its deficiencies. And if the deed in itself is inoperative on account of some serious deficiency it cannot be cured by admissions in the certificate.”

SECTION 75. DELIVERY.

Delivery was necessary to render a deed effective, both at Common law and under modern statutes. Delivery may be in *escrow*. A delivery in escrow is one made to a third person who is to hold the deed until a certain act has been done (as for example the payment of the purchase price) and then deliver the deed to the grantee named in the deed.¹⁰

¹⁰ A more complete treatment of the matters discussed in this chapter will be found under the

subject of Abstracts, in this volume.

CHAPTER VIII.

DESCRIPTION OF LAND.

SECTION 76. IN GENERAL.

In addition to describing the estate which the grantee is to take, it is also necessary that the deed should identify the land to be transferred by such deed. This identification of the land may be secured by reference to the following: (1) natural objects or boundaries, such as rivers, mountains, etc.; (2) artificial devices, such as stakes or marked trees; (3) courses and distances.

By course is meant the direction of a line, and by distance, its extent. Natural objects and artificial devices are also known as monuments; courses and distances, as metes and bounds. The name of calls is given to all the above mentioned objects collectively.

It is also a common practice to insert in a deed the quantity of land conveyed thereby. In case of inconsistencies between the different methods of identification they control, in the following order: first, natural objects; second, artificial devices, third, courses and distances, and fourth, enumeration of quantity.

In the case of a description where one description is accurate and the other manifestly inaccurate, the latter may be rejected as surplusage.

SECTION 77. EXCEPTIONS AND RESERVATIONS.

A general description of the property conveyed may be qualified by what is known as "exceptions and reservations."

An exception is a withdrawal from the operation

of the grant of some part of what is granted in general terms, as for instance, a grant of a certain field, except the northwest acre.¹ An exception is therefore always a part of the thing granted and is tangible.

A reservation is the creating out of the property granted, of some new incorporeal hereditament, such as a right of way for the benefit of the grantor.

SECTION 78. AMERICAN SYSTEM OF LAND PARCELING.

In order to secure a more scientific system of land division and description, the United States Government early adopted a uniform rectangular system of surveying the public lands of the United States. Under this system the public land of the United States when first surveyed, is intersected by principal meridians, running north and south, and base lines running east and west. Starting from these as a basis, the land is then divided into townships, six miles square; the ranges of townships being numbered east and west along the base lines and the numbers of the townships in the range north and south along the principal meridians. Under this system the township marked X in the following map would be described as township five, north, range three, west of the—principal meridian.²

¹ It has been held that where the grant is of a specified quantity of land, a similar specified quantity can not be excepted from it. This question is a very technical one and not of very great importance. It is safer,

however, in such a case to have the exception come before the enumeration of quantity.

² For a more detailed discussion of the description of land, see the subject of Abstracts in this volume.

N
Towns North

1		X		
2				
3				
4				
5	4	3	2	1

S

W Range West

(Range Line Principal Meridian.) E

Each township is next divided into thirty-six sections, arranged and numbered as in the following map:

N

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

S

W

E

The sections are next divided into quarter sections of 160 acres each, which is the quantity generally transferred by the government in its grants. Provisions are made in the law for the correction of errors in the survey caused by the distance between the range lines growing smaller toward the north and for the surveying of fractional townships or sections, part of which are occupied by navigable lakes, streams, etc. The treatment of these provisions belong more properly to a book on surveying than on law.

SECTION 79. PLATS AND SUBDIVISIONS.

In the case of towns and cities a further division of the land is required for the purpose of conveyance and description. This is secured by means of plats and subdivisions. Under this system the owner of, say, the northeast quarter of section 16 in a certain township will have a map made of such quarter section platted off into blocks and lots. This map will be placed on record and a lot in such subdivision can be transferred by a description similar to the following: Lot 13, block 7, in William Smith's Subdivision of the northeast quarter section 17, township 13 south, range 8 east of the third principal meridian.

CHAPTER IX.

SPECIAL TOPICS IN REAL PROPERTY.

SECTION 80. CONTEST IN LEGAL HISTORY OF ENGLAND BETWEEN THOSE WHO DESIRED TO ALLOW AND THOSE WHO DESIRED TO PREVENT THE ALIENATION OF REAL ESTATE.

One of the most interesting chapters in the legal history of England is the long contest between those who desired to keep the land mainly in a few noble families and to prevent its alienation, and those who desired to make land a free object of commerce.¹

The first attempt to limit its alienation came in the form of the fee-conditional. This estate proving ineffectual to accomplish the desired purpose, it was abolished by the Statute of De Donis and the fee-tail substituted therefor. A little later a new method was devised of alienating estate in fee-tail by the means of fictitious suits known as fines,² and common recoveries.³

¹ For a detailed account of this contest, see Appendix A to Real Property.

² Coke's Institute, Vol. II, p. 491.

(1) This, though a just description of fines, considered according to their original and still apparent import, yet gives a very inadequate idea of them in their modern application. In Glanvill's time they were really amicable compositions of *actual* suits. But for several centuries past, fines have been only so in *name*, being in *fact* *fictitious* proceedings, in order to transfer or secure real property, by a mode more efficacious than ordinary conveyances.

What the superiority of a fine in this respect consists of will best appear, by stating the chief uses to which it is applied. One use of a fine is *extinguishing dormant titles* by shortening the usual time of limitation. Fines, being agreements concerning lands or tenements solemnly made in the King's courts, were deemed to be of equal notoriety with judgments in writs of right; and therefore the common law allowed them to have the same quality of barring all, who should not claim within a year and a day. See Plowd., 357. Hence we may probably date

Upon the fee-tail becoming ineffectual for the purpose for which it was devised, some of the conveyancers of the days invented a new form of conveyance by which land was granted to the first taker for life with remainder to his heirs or remainder to the heirs of his body. The purpose of the inventors of this form of conveyance was defeated by the construction put upon

the origin and frequent use of fines as feigned proceedings. But this puissance of a fine was taken away by the 34 E. 3, and this statute continued in force till the 1 R. 3, and 4 A. 7, which revived the ancient law, though with some change, proclamations being required to make fines more notorious, and the time for claiming being enlarged from a year and a day to five years.

³ A common recovery is in some respects similar to a fine; for as a fine is the compromise of a fictitious suit, so a recovery is a fictitious suit brought against the tenant of the freehold, and carried on to judgment. 2 Bl. Com., 357; Shep. Touch., 37. A common recovery generally consists of two parts perfectly distinct: 1st, of the recovery, which assumes all the forms of a real action, and is founded on the supposition of an adverse claim; and 2dly, of the recovery deed, which is, in form at least, partly a preparatory step, to suffering the recovery, and partly a declaration of the uses of the recovery when suffered. Notwithstanding the recovery assumes the form of a real action, it is considered merely as a common assurance, and the courts take notice of it as such. See *Pelham's case*, 1 Co., 14, b. 2, Bl. Com., 358, 359, Pig. Rec., 56; 1 Prest. Conv., 8. The person against whom the writ is brought is called the *tenant*; the person suing the writ is called the *demandant*, as he claims or demands the premises as his right and in-

heritance, alleging that the tenant had deceived him, or at least had come in under the disseisor, or in the *post*. The tenant then calls on the remainder-man, or the person under whom he claims, to warrant his title, which is denominated vouching the person, who is thence called the *vouchee*. The vouchee either vouches over, or makes default. On default made, judgment is given that the demandant recover against the tenant, and that the tenant recover against the vouchee or warrantor, and so on, which is called the *recovery in value*, or recompense, and is always supposed to go as the lands would have gone if they had not been recovered; though indeed, this recompense is merely nominal, and, the judgment to recover in value is mere form. When the *præcipe* is brought immediately against the tenant in tail, it only bars him of the estates of which he is then actually seized. *Taltarum's case*, 12 Ed., 4, 14; Pig. Rec., 9; Bro. Abr. Tail, 32. It is, therefore, usual for him to convey an estate of freehold to another person, that the *præcipe* may be brought against such person (who is called the *tenant to the præcipe*), and that such person may vouch the tenant in tail; for if the tenant in tail comes in as vouchee, it bars every latent right and interest which he may have in the lands. If the *præcipe* be brought immediately against the tenant in tail, and he vouch over the common vouchee, it is called

it by the court in a decision which has since been known as the rule in Shelley's Case.

SECTION 81. THE RULE IN SHELLEY'S CASE.

The two most famous statements of the rule in Shelley's Case are those by Preston and Kent which were as follows:

a recovery with *single voucher*, see Fearn. Post. Works, p. 336; if against the tenant of the freehold, and he vouch over the tenant in tail, and the tenant in tail vouch over the common vouchee, it is called a recovery with *double voucher*; and so on, according to the number of persons vouched. And when an intail is to be barred, it is always proper, for the reasons before mentioned, to suffer a recovery with a double voucher. Watk. Conv., 134. Such a recovery, in which the tenant in tail is vouched, and is vouched over, will not only bar an actual estate tail, of which he is seised, but it will bar all estates tail which have been divested, discontinued, or previously aliened. Salk., 571; Brook. Tail, pl. 32. And it may bar several estates tail, or the right to several estates tail, by one and the same operation. *Baxton vs. Lever*, Cro. Eliz., 388, 1 Ves., 253. It will also bar all remainders and reversions expectant thereon, even though the estate tail has been previously barred by a fine with proclamations levied by the tenant in tail. *Sheffield vs. Ratcliffe*, 2 Rol. Rep., 418. And the better opinion seems to be, that a recovery suffered by the issue in tail after the death of the ancestor, and after a fine with proclamations levied by the ancestor, which has effectually barred the estate tail, will bar all remainders and reversions, which are, or were expectant on the estates tail. Fearn. Post. Works, 442; 1

Prest. Conv., 126; 1 Prest. Abst., 394, 395.

With respect to the effect of a recovery, it may be further observed, that the recoverer, generally speaking, gains a clear and absolute fee in the premises recovered. But where the person by whom the estate tail was created, had a determinable or defeasible fee, the recovery cannot do more than acquire the ownership for the whole of that determinable or qualified fee. 1 Prest. Conv., 141. And when a tenant of a remote estate tail suffers a common recovery, in which he is vouched, and vouches over, the effect of this recovery will be merely to bar his own estate tail, and the remainders and reversions expectant thereon (3 Co., 6, 8 T. R., 10), and all conditions and collateral limitations annexed to his estate; it will not affect prior estates tail, or any other prior estates. *Smith vs. Clifford*, 1 T. R., 738. And the fee acquired by such recovery may be barred by a recovery afterwards suffered by the tenant of a prior estate tail. 1 Prest. Abst., 394. So when the entail is of a subject which has a limited duration, as a rent-charge, created *de novo*, and limited for an estate tail, without any remainders over, the recovery of tenant in tail cannot enlarge the estate beyond the period prescribed for its duration. 1 Prest. Conv., 140; Ante, vol. 1, p. 448 (n. f). It is also observable, that the estate recovered is not subject to any charges

“In any instrument, if the freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs

but to those of the recoverer. Hence it is preferable, in some cases, to a fine, as a fine lets in the incumbrances of the ancestors as well as those of the cognizers. *Watk.*, 134, Ante, p. 610 (n. 1). On the other hand, a fine is, in some instances, preferable to a recovery, as the former operates as an *estoppel* by the statute, where a recovery would not estop. *Pig. Rec.*, 32, 34, 55; 2 *Cru.*, 271; *Plowd.*, 515, Ante, p. 610 (n. 2). But no tenant in tail can, by suffering a common recovery, bar any charges which are an incumbrance on his own estate, nor any estates derived out of his own estate tail. On the contrary, he may give stability to these estates and charges, by suffering a common recovery. *Goodright vs. Mead*, 3 *Burr.*, 1703; *Stapilton vs. Stapilton*, 1 *Atk.*, 2; 1 *Prest. Conv.*, 142.

With respect to the persons who may suffer recoveries.—A recovery may be suffered by a tenant in fee-simple, in order to strengthen the title, *Watk.*, 135; but it will not bar an executory devise or springing use annexed to that estate. *Pells vs. Brown*, *Cro. Jac.*, 590; *Palm.*, 131; 2 *Fearn.*, Ex. Dev., 66, 69; *Pig. Rec.*, 134; though a recovery by tenant in tail will bar an executory devise or springing use annexed to his estate. *Page v. Hayward*, 2 *Salk.*, 570; 1 *Prest. Conv.*, 3. So a feme covert may convey her freehold and inheritance by suffering a recovery; and no fine is necessary on account of coverture, when a recovery is suffered. 1 *Prest. Conv.*, 34. The husband has the freehold in right of his wife, and he alone may convey the freehold to

make a good tenant to the præcipe, 2 *Rol. Abr.*, 394, pl. 4; *Robinson v. Cumming*, *Cas. Temp. Talb.*, 114; *Atk.*, 473; but the wife will not be barred unless she is vouched. 1 *Prest. Conv.*, 56. Where the wife has the freehold by way of separate estate, she is to be considered as a feme sole, and alone is competent to make a good tenant of the freehold. 1 *Prest. Conv.*, 34, 36. A recovery, with the concurrence of the freeholder, may be suffered by a tenant in tail, either in possession, reversion, or remainder, 2 *Rol. Abr.*, 394; or by a person who has the *right of an estate tail* once vested, and which has been devested or discontinued, *Maxwell's case*, 2 *Plowd.*, 8 b. 3 *Co.*, 6; *Sheffield v. Ratcliffe*, *Hob.*, 334; *Lincoln College case*, 3 *Co.*, 38 b.; or, as before observed, by the heir in tail, after the estate tail has been barred by fine, or the heirs are bound by warranty. *Supra*, p. 614; *Barton v. Leaver*, *Cro. Eliz.*, 388. But a person who has a *contingent* or *executory interest* in tail, as under an executory devise, or a springing or shifting use, cannot suffer a common recovery with effect, so as to bar either his own interest (except by way of *estoppel*), or the issue in tail, or those in remainder or reversion; nor can the issue in tail suffer a common recovery with effect in the lifetime of the ancestor. *Apprise v. Apprise*, 1 *Keb.*, 391; 1 *Prest. Conv.*, 142; 1 *Prest. Abst.*, 395. The *alienee* of a tenant in tail, or the *assignee* of the crown, claiming the estate of a tenant in tail under an attainder for treason, cannot, in any case, bar the estate tail or the re-

of his body, he takes a fee-tail; if to his heirs, a fee-simple." ⁴

The rule as stated by Chancellor Kent was as follows:

"When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons, to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." ⁵

The application and extent of the rule has been thus expressed in Coke's Institute:

"The rule mentioned in the text is usually called the rule in *Shelley's case*. As this rule is intimately connected with the doctrine contained in the present chapter, it may be desirable in this place to consider the manner in which it is applied in the construction.—1st. Of deeds. 2dly. Of surrenders of copyholds; and 3dly, of devises.

"1st. Of the application of the rule in *Shelley's case* in the construction of deeds. Where an estate was

mainders, by suffering a common recovery. Hob., 259. And the right of suffering a common recovery is a privilege personal to the donee in tail, and his heir in tail, when heir; therefore a corruption of the inheritable blood of the issue, by the attainder of their ancestor for treason, will preclude their right to suffer a common recovery so as to bar the remainders. Jenk. Cent., 251, Hob., 345. And attainder of tenant in tail creates a disability to suffer a common recovery, *Barton's case*, 2 Rol. Abr., 394; Jenk. Cent., 250;

though between the crime and attainder, it should seem, that a common recovery may be suffered. *Stevens v. Winning*, 2 Wils., 219; 1 Prest. Conv., 140. But a recovery suffered by a tenant in tail, being an *alien*, will bar the remainders expectant on his estate. 4 Leon., 84. It may be further observed, that a recovery will be good only for that portion of estate which is vested in the tenant in tail who is vouched.

⁴ Warvelle on Real Property, 269.

⁵ Warvelle on Real Property, pp. 268-269.

conveyed to A. for life, remainder to the heirs, or heirs of the body of A., if the construction had been made according to the strict meaning of the words, A would have taken only an estate for life, and the remainder to the heirs, etc., of A. would have been considered as words of purchase, giving a contingent remainder to the heirs, etc., of A., according to the rule of law, that *nemo est hæres viventis*; but such a construction would have been attended with these inconveniences: 1st. The lord of the fee would have been deprived of the wardship and marriage of the heir, because, in that case, the heir would have taken as a purchaser, without claiming anything from his ancestor by descent. 2dly. The remainder to the heirs, or heirs of the body, being contingent until the death of the tenant for life, the inheritance would have been in suspension or abeyance: which was never allowed but in cases of absolute necessity; because the abeyance of the inheritance created a suspension of various operations of law, particularly of the remedies for the recovery of land by real actions. And 3dly. If the remainder, in those cases, had been construed to be contingent, no alienation could have taken place in the life-time of the ancestor. To obviate which inconveniences, was the origin of the rule of law, laid down in *Shelley's case*, viz., that 'when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, that always, in such cases, 'the heirs' are words of limitation of the estate, and not words of purchase,' 1 Co., 104 a. Whence it follows, that such remainder is immediately executed in possession, in the ancestor so taking the freehold, and is not contingent or in abeyance. Bl.

Arg. Harg. Tracts, 498, 510; 4 Cru. Dig., 470, 1. Serjeant Rolle, indeed, takes a distinction respecting this rule, by saying, that where the freehold is so limited to the ancestor, and a mediate remainder to his right heirs, that all the intermediate estates between that and the limitation to his heirs, as well as his own estate, may determine during his life, in that case the limitation to his heirs is in abeyance, because he can have no heir to take the remainder. 2 Rol. Abr., 418. But Mr. Fearne has controverted this distinction, and shown that the possibility of the freehold's determining in the life-time of the ancestor, who takes it, does not prevent the subsequent limitation to his heirs from attaching in himself. Fearn. Cont. Rem., 32; Et vid. Curtis vs. Price, 12 Ves., 89. With respect to the mode in which mediate limitations are vested, it is observable, that where the subsequent limitation is immediate, it then becomes executed in the ancestor, forming by its union with his particular free hold one estate of inheritance in possession; but where such limitation is mediate, it is then a remainder vested in the ancestor, who takes the freehold, not to be executed in possession, until, the determination of the preceding mesne estates. Fearn. Cont. Rem., 38. And where the limitations intervening between the first estate for life, and the limitation to the heirs of the body, are contingent, the estate for life is not merged, because the intervening limitations would be thereby destroyed; but the two limitations are united and executed in the ancestor only, until such time as the intervening limitations become vested; and then open and become separated, in order to admit such intervening limitations as they arise. *Lewis Bowles's case*, 11 Co., 79; Fearn. Cont. Rem., 42.

“With regard to joint and several limitations, Mr.

Fearne observes, that where there is a joint limitation of the freehold to several, followed by a joint limitation, of the inheritance in fee-simple to them; as an estate to A. and B. for their lives, or in tail, and afterwards to their heirs, so that both limitations are of the same quality, that is, both joint, it seems the fee vests in them jointly. Fearn. Cont. Rem., 40; Ante, vol. 1, p. 774, n. (N). And so if the limitation of the freehold be to baron and feme jointly, remainder to the heirs of their bodies, it is an estate tail executed in them; as they are capable of issue, to whom such joint inheritance can descend. Brook. Estate, p. 75. But if the limitation of the freehold be not joint but successive, as to one for life, remainder to the other for life, remainder to the heirs of their bodies; there it seems the ultimate limitation is not executed in possession, but gives them a joint remainder in tail. Stephens vs. Bretridge, T. Raym., 36; 1 Lev., 36. And if the limitation of the inheritance be to several men, or to several women in tail, instead of fee-simple, though the freehold be to them jointly, they take several estates of inheritance; because they cannot have issue between or among them as a man and woman may. Ant. 182 b., vol. 1, p. 741, 2. And the same rule extends to other cases, where the relative situations of the grantees render the possibility of issue between or among them more remote than what is termed a simple or common possibility, or else is inconsistent with the laws of marriage. Fearn. Cont. Rem., 41. Ant. vol. 1, p. 517 n. (D). Where the particular estate is limited to A. with remainder to the heirs of A. and B. this is a contingent remainder, and not a vested estate. 2 T. R., 435; 2 Bl. Rep., 731. So if there be a limitation to the wife for life, remainder to the heirs of the body of the hus-

band and wife, this is no remainder in the wife, for the freehold is limited to her alone; and as the person who is to take in remainder must be heir of both their bodies, if the wife should die before the husband, there can be no one to answer that description when the particular estate determines, because the baron cannot have an heir during his life, nor could it be involved or flow into the limitation to the feme herself, as not being confined to her own heirs; therefore the remainder is in contingency. 2 Rol. Abr., 417. Cases of the last mentioned class are distinguishable from those cases, where the limitation to the heirs is held to vest, notwithstanding the ancestor's freehold may determine in his life-time; for there the limitation is to the heirs of the body, of the ancestor only; but here it is to the heirs of the body, of the ancestor and of her baron; and though every person may so far be supposed to carry his own heirs in himself during his life, as that a limitation to them where he takes a preceding freehold may vest in himself, *supra*, 22b.; yet no person can be supposed to include in himself the heirs of himself, and of some body else. Fearn. Cont. Rem., 44, 45. But where the particular estate is granted to two persons, with a limitation to the heirs or heirs of the body of one of them, the inheritance is executed in the person to whose heirs it is limited. *Alpass vs. Watkins*, 8 T. R., 516. Limitations of this kind are said to be executed *sub modo*, that is, to some purposes, though not to all; for though they are so far executed in, or blended with the possession, as not to be grantable away from, or without the freehold, by way of remainder; yet they are not so executed in possession as to sever the jointure, or entitle the wife of the person so taking the inheritance to dower. *Ant.*, 184 a., vol. 1, p. 746; and see the books cited in n. (56) there.

“The rule in Shelley’s case, however, does not apply where the ancestor takes only an estate for years (another person being the grantor); for, in such case, a remainder to his heirs, or to the heirs of his body, will not vest in himself, but in such heirs, by purchase. Post, 319 b. Sir C. Tippin’s case, cited 1 P. Wms., 359. Neither will it take place, unless the particular estate of freehold, and the remainder to the heirs or heir of the body, are created by the same conveyance. Cranmer’s case, 2 Leon., 57; Moor vs. Parker, 1 Ld. Raym., 37; 2 Vern., 486; Doe vs. Fonnereau, Dougl., 487, 510. Venables vs. Morris, 7 T. R., 342; Fearn. Cont. Rem., 99. But as an appointment in pursuance of a power, when executed, is to be considered as if it had been inserted in the original deed by which the power of appointment was created, 7 T. R., 347; it seems, that where there is a limitation to a person for life by one deed, and the estate is afterwards limited to the heirs of his body, under an execution of a power of appointment contained in that deed, in such case the several limitations will consolidate. Fearn. Cont. Rem., 102; Prest. Ess. on Rule in Shelley’s case, 57. And it is immaterial, with respect to this rule, whether the ancestor takes the freehold by express limitation, or by implication arising from the deed in which the estate is limited to his heirs, &c.; in either case the subsequent limitation vests in himself. Pybus vs. Mitford, 1 Ventr., 372.

“It may be further observed, that the rule in question is only applied to limitations in which the word ‘heirs’ is used, on account of the peculiar signification of that word, and the maxim that *nemo est hæres viventis*; so that if lands are limited to A. for life, remainder to his first and other sons and the heirs of their bodies;

or remainder to the child and children of A., or to the issue of A. and the heirs of their bodies; no more than an estate for life will vest in A., and the words *son*, *child*, or *issue*, will operate as words of purchase. Lewis Bowles's case, 11 Co., 30. And the rule does not extend to the word 'heir' in the singular number, with words of limitation superadded. Walker vs. Snow, Palm., 359. Nor where the estates are of different natures, as if the first limitation only gives a trust estate of freehold, and the subsequent limitation to the heirs of the body carries the legal estate. Lord Say and Sele vs. Jones, 3 Bro. P. C., 113. Nor to cases of marriage articles; which being executory are construed according to the intention of the parties, whose chief object in such agreement, is to make a provision for the issue of the marriage; therefore, where in marriage articles it is agreed to settle lands, to the use of the husband for life, with remainders to the heirs of his body, these last words are construed to be words of purchase, and to mean the first and other sons of the marriage, and the heirs of their bodies. 1 Bro. C. C., 222; Trevor vs. Trevor, 1 P. Wms., 662; 1 Ab. Eq., 387; Cusack vs. Cusack, 1 Bro. P. C., 470. And where articles and a settlement are made before marriage, and the settlement is made in pursuance of the articles, if the words 'heirs of the body' are transcribed from the articles into the settlement, they will be altered in chancery, and the settlement will be rectified according to the intention of the articles, by making the husband only tenant for life, with remainders to the issue of the marriage. West vs. Erissey, 2 P. Wms., 349; 3 Bro. P. C., 327; 1 Collect. Jur., 463; Hart vs. Middlehurst, 3 Atk., 371; Roberts vs. Kingsley, 1 Ves., 238. So if the settlement is made after the marriage, and adopts

the words of the articles. *Streatfield vs. Streatfield*, *Forrest.*, 176. But this doctrine is adopted only in cases of marriage articles, and is not extended to limitations, in settlements, of the legal estate. *Alpass vs. Watkins*, 8 T. R., 516. And, although where articles are entered into before marriage, and a settlement is made after marriage different from those articles, the court will set up the articles against the settlement; yet, where both the articles and settlement are previous to the marriage, at a time when all the parties are at liberty, and the settlement is not expressed to be made in pursuance of the marriage articles (as in the above cited case of *West and Erissey*) if such settlement differ from the articles, it will be considered as founded on a new agreement between them, and will control the articles. *Legg vs. Goldwire*, *Cas. Temp. Talb.*, 20; *Fearn. Cont. Rem.*, 154; 4 *Cru. Dig.*, 487.

“The rule, in *Shelley’s* case, has been adopted in the construction of assignments of terms for years; and the words ‘heirs of the body’ have been held to be words of limitation, *Peacock vs. Spooner*, 2 *Vern.* 43, 195; *Webb vs. Webb*, 1 *P. Wms.*, 132; *Hayter vs. Rod*, 1 *P. Wms.*, 360; 2 *Ves.*, 660; *Theebridge vs. Kilburne*, 2 *Ves.*, 233; though the construction has been different where there were words of limitation superadded to the words ‘heirs of the body.’ *Archer’s* case, 1 *Co.*, 66; *Hodsol vs. Bussey*, *Forrest. MSS.*; *S. C.*, 2 *Atk.*, 89; *Barnard.*, 199; *Price vs. Price*, 2 *Ves.*, 234; *Sands vs. Dixwell*, 2 *Ves.*, 652.

“2dly. Of the application of the rule of *Shelley’s* case, in the construction of surrenders of copyholds:—The rule under consideration is equally applied in construing surrenders of copyhold estates as in deeds;

and therefore where a person surrenders to the use of himself for life, remainder to another in tail, remainder to his own right heirs, there the heirs shall take by descent. Gilb. Ten., 270; Fearn. Cont. Rem., 79; Allen vs. Palmer, 1 Leon., 101; Roe vs. Aistrop, 2 Bl. Rep., 1228. And Mr. Fearnie observes, that where an estate for life is limited either to the father or mother only, and the subsequent limitation is to the heirs of both their bodies, the construction is the same in regard to copyholds as to freeholds; viz., the subsequent limitation does not vest in the ancestor taking the estate for life, but is a contingent remainder to the heirs of the bodies of both father and mother. Lane vs. Pannel, 1 Rol. Rep., 238; Frogmorton vs. Wharrey, 2 Bl. Rep., 728. In Lane vs. Pannel, Lord Coke took a distinction between a limitation upon a surrender by a copyholder in fee to his own heirs general where he takes a preceding estate of freehold himself, and the like limitation where he takes no preceding freehold estate; a distinction which certainly has no place in respect of freehold lands; for in freeholds, we have seen, where the estate moves from the grantor, the ultimate limitation to his heirs general, though the ancestor takes no preceding freehold, will be a reversion in him, and part of the old estate, and the heir will take it by descent; but Lord Coke held, that where a person surrendered a copyhold to the use of himself for life, remainder to another in tail, remainder to the right heirs of the surrenderor, there the heirs should have it by descent; but otherwise, where the surrenderor had an estate for life or in tail limited to him; for then his heir should enter as a purchaser, as if such use had been limited to the right heirs of a stranger. But Mr. Fearnie observes, that the only ground upon

which he could account for Lord Coke's opinion, is, the supposition that an entire new estate was created and derived under the uses of the surrender, throughout the whole of them, and that no estate taken under those uses is any part of the whole estate. Fearn. Cont. Rem., 87; and this notion has been entirely exploded by modern decisions. See Gilb. Ten., 272; *Roe vs. Griffiths*, 4 Burr., 1952; *Thurstout, d. Gower vs. Cunningham*, 2 Bl. Rep., 1046; Fearn. Cont. Rem., 90.

“3d. Of the application of the rule in construing devises:—The rule now under consideration having been established for purposes of general utility, it has been adopted in the construction of devises, as well as in that of deeds. But it being a principle of law, that the intention of the testator is to be the chief guide in construing wills; it has been often doubted how far the application of this rule should be extended, in contradiction to the intention of the testator. Fearn. Cont. Rem., 290, 299. It has, however, been uniformly applied to devises of legal estates. *Rundale vs. Eley*, Cart., 170; although it appeared from other circumstances, besides an express devise for life, that the testator did not intend to give the first devisee a greater estate; such as a power to settle a jointure, with the concurrence of trustees; or an interposed estate to trustees to preserve contingent remainders; or a clause, that the devisee's estate should be without impeachment. *Broughton vs. Langley*, 2 Ld. Raym., 273; *Papillon vs. Voice*, 2 P. Wms., 471; *Sayer vs. Masterman*, Fearn. Cont. Rem., 250; *Ambl.*, 344; *Blandford vs. Applin*, 4 T. R., 82; *Candler vs. Smith*, 7 T. R., 531; *Cock vs. Cooper*, 1 East, 229; *Pearson vs. Vickers*, 5 East, 548; *Poole vs. Poole*, 3 Bos. & P., 627; *Ant.*

vol. 1, p. 548, n. (N). So, although the limitation to the heirs be only mediate, yet the devisee will take an estate in fee or in tail, in remainder, to take effect in possession, upon the determination of the interposed estate; and the estate for life is not merged in the remainder. *Coulson vs. Coulson*, 2 Atk., 247; *Hodgson vs. Ambrose*, Dougl., 337; 3 Bro. P. C., 416; *Thong vs. Bedford*, 1 Bro. C. C., 313. And the rule holds, although no estate for life is expressly devised, but arises by implication, *Hayes vs. Foord*, 2 Bl. Rep., 698; and although the limitation be to the heir in the singular number. *Burley's case*, 1 Vent., 230; *Wilkins vs. Whiting*, 1 Rol. Abr., 836; *Bulstr.*, 219; 2 Vern. 324; *Miller vs. Seagrave*, Rob. Gav., 96; *Dubber vs. Trollop*; *Rob. Gav.*, 96; *Ambl.*, 453; *Blackburn vs. Stables*, 2 Ves. and B., 371. And a devise to the heirs, or heirs of the body, of a prior devisee for life, with superadded words of limitation, will be construed within the rule in *Shelley's case*, *Goodright vs. Pullyn*, 2 Ld. Raym., 1437; 2 Stra., 729; *Legate vs. Sewell*, 1 P. Wms., 87; *Morris v. Ward*, 8 T. R., 518; 2 Burr., 1102; *Denn, d.* *Webb vs. Puckey*, 5 T. R., 299; though there are some cases (which will be mentioned hereafter) in which a different construction prevails. The rule in question has also been applied to devises of trust estates, the construction of which is the same in the court of chancery, as it would be in a court of common law upon a devise of legal estate. *Sweetapple vs. Bindon*, 2 Vern., 536; *Fearn. Cont. Rem.*, 164; *Bate vs. Coleman*, 2 Vern., 670; 1 P. Wms., 142; *Garth vs. Baldwin*, 2 Ves., 646; *Wright vs. Pearson*, *Ambl.*, 358; *Fearn. Cont. Rem.*, 187; *Austen vs. Taylor*, *Ambl.*, 376; *Jones vs. Morgan*, 1 Bro. C. C., 206. And it takes place also in devises of copyhold estates. *Lawsey vs. Lowdell*,

2 Rol. Abr., 253, pl. 4; Gilb. Ten., 270; *Bushby vs. Greenslate*, 1 Str., 445; and in devises of terms for years; though if there appears any other circumstance or clause in the will to show the intention of the testator, that the words 'heirs of his body,' should be words of purchase, and not of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase. *Fearn. Ex. Dev.*, 300; 3 *Cru. Dig.*, 344.

"The rule in *Shelley's* case, however, is not applied to devises, where the limitation is to sons or children, 1 Rol. Abr., 837, pl. 13; *Ginger vs. White*, Willes, 348. *Goodtitle vs. Woodhall*, Willes, 592; *Goodright vs. Dunham*, Dougl, 264; or where words of explanation are added to the word 'heirs,' from whence it may be collected that the testator meant to qualify the meaning of the word 'heirs,' and not to use it in its technical sense, but as a description of the person to whom he intended to give his estate after the death of the first devisee. As where a person devised to his son B. I. and his heirs lawfully to be begotten; that is to say, to his first, second, third, and every son and sons lawfully to be begotten of the said B. I. and the heirs of the body of such first, second, third, and every son and sons successively, lawfully issuing; and in default of such issue, then to his right heirs forever. It was resolved, that B. I. took only an estate for life; the word 'heirs' being fully explained by the subsequent words to be a word of purchase. *Lowe vs. Davies*, 2 Ld. Raym., 1561; Et vid. *Doe vs. Laming*, 2 Burr., 1100; 1 Bl. Rep., 265; *Rob. Gav.*, 95; *Goodtitle vs. Herring*, 1 East, 264; Sed vid. *Poole vs. Poole*, 3 Bos. & P., 620. And where words of limitation are superadded to the word 'heir,' in the singular number, from which it appears to have been the testator's intention to denote

by the word 'heir,' a new stock and root of inheritance; or where the context shows that that word is not used in its technical sense; as the word 'issue,' or 'without impeachment of waste;' a limitation to trustees to preserve contingent remainders; or a direction so to frame the limitation, that the first taker shall not have the power of barring the intail, in these cases, it will be construed a word of purchase; and the first devisee will take an estate for life only. Archer's case, 1 Co., 66 b.; Clarke vs. Day, Moor, 593; Blackburn vs. Stables, 2 Ves. & B. 371. And Mr. Fearne observes, that there may possibly be some cases, where the super-added words of limitation may be admitted to control the preceding words, heirs, heirs male, &c., though in the plural number; when such superadded words limit an estate to such heirs, heirs male, &c., of a different nature, from that, which the ancestor would take, if the preceding words, 'heirs male,' &c., in those cases, were taken as words of limitation. As in the case put by Anderson (1 Co., 95 b., et vid. 1 Atk., 413), of a limitation to the use of a man for life, and after his decease to the use of his heirs, and the heirs female of their bodies; here the first word 'heirs' would have given a fee to the ancestor, if taken as a word of limitation; whereas the subsequent words, 'and the heirs female of their bodies,' grafted on the word 'heirs,' could give only an estate tail female to the heirs. In such cases, the general effect of the first words, 'heirs of the body,' &c., seems to be altered, abridged, and qualified, by such subsequent express words of limitation annexed to them, as cannot possibly be satisfied by considering the first words as words of limitation. But we must take care to confine this observation to those cases, where the ingrafted words describe an

estate descendible in a different course, and to different persons as special heirs, from what the first would carry the estate to: viz., to males instead of females, or *vice versa*; for where the first words give an estate tail general, and the words ingrafted thereon are words serving to limit the fee, it seems by the general and better opinion, that the annexed words of limitation are not to be attended to, as in the cases of *Goodright vs. Pullyn*, 2 Ld. Raym., 1437.; *Wright vs. Pearson*, Fearn. Cont. Rem., 187, Ambl., 358; and *King vs. Burchall* (Ambl., 378), where the ingrafted words limited the whole fee. Fearn. Cont. Rem., 286. So the rule is not applied to devises, where the remainder is given to the heir of the first devisee, for life only; in which case the first devisee will take no more than an estate for life. *White vs. Collins*, Com. Rep., 289. And where the word 'issue' is used with words of limitation superadded, it will be construed to be a word of purchase. *Loddington vs. Kyme*, 1 Ld. Raym., 203; *Backhouse vs. Wells*, 10 Mod., 181; and see *Doe vs. Collis*, 4 T. R., 294, adj. acc., in which case Lord Kenyon observed, that, in a will, issue was either a word of purchase or of limitation, as would best answer the intention of the devisor; though, in the case of a deed, 'issue' was universally taken as a word of purchase. Et vid. *Doe vs. Burnsall*, 6 T. R., 30. But the word 'issue,' in a will, will not be construed to be a word of purchase, where the general intent requires a different construction. See *King vs. Melling*, 1 Vent., 225, 232; 2 Lev., 58; 2 P. Wms., 472; *King vs. Burchall*, 4 T. R., 296, n.; *Roe, d. Dobson vs. Grew*, Wilm., 272; 2 Wils., 322. In cases where the testator has directed a settlement to be made, and the court of chancery has been called upon to give directions respect-

ing such settlement, the court has deviated from the rule in Shelley's case, and has so far departed from that which would be the legal operation of the words limiting the trust, if reduced to a common law conveyance as to construe the words 'heirs of the body,' although preceded by a limitation for life, as words of purchase, and not of limitation. But this has been done only in cases where it appeared from some clause or circumstance essentially repugnant to the nature of an estate tail, that the deviser could only intend to give the first devisee an estate for life; and that he used the words 'heirs of the body,' for the purpose of describing the persons, to whom he meant to give the estate, after the death of the first devisee. *Leonard vs. Earl of Sussex*, 2 Vern., 526; *Stamford, (Earl of) vs. Hobart*, 3 Bro. P. C., 31.; *Papillon vs. Voice*, 2 P. Wms., 471; *Ashton vs. Ashton*, 1 Collect. Jur., 402; *Glenarchy vs. Bosvill*, Forrest, 3; 1 Collect. Jur., 405. *Meure vs. Meure*, 2 Atk., 265. And see the case of *White vs. Carter*, Ambl., 670, adj. acc., in which Lord Camden took a distinction between the case, where a testator has given complete directions for settling his estate, with perfect limitations, and where his directions are incomplete, and are rather minutes or instructions, and cannot be performed in the words of the will. In the former case, said his Lordship, the legal expression shall have the legal effect, though perhaps contrary to his intention; as in *Garth vs. Baldwin*, 2 Ves., 646. In the latter case, the court will consider the intention, and direct the conveyance according to it. And where there is a settlement without articles, the words will be left to their legal operation, unless from some recital in the deed, or some other circumstance, it clearly appears that the language of the limitation was owing to mistake.

Butl. Feran. Cont. Rem., 114. Ch. Ca., 27. *Doran vs. Ross*, 1 Ves. jun., 57. Lastly, where the estate devised to the ancestor, is merely an equitable or trust estate, and that to his heirs, or the heirs of his body, carries the legal estate, they will not incorporate into an estate of inheritance in the ancestor; as would have been the case, if both had been of one quality, that is, both legal, or both equitable. Fearn. Cont. Rem., 68. For where the limitations are both legal, the estate-tail arises by legal construction or a rule of law; and when the limitations are both equitable (without other ingredients in the case to control the construction), a similar rule is adopted by equity, to preserve an uniformity in construction. But when both the estates are not legal, the application of a legal construction or operation of a rule of law, which must equally affect both, seems to be excluded, by one of the objects of that construction not being a subject of legal cognizance. So when both are not equitable estates, their combination seems to be out of the reach of an equitable construction, to which one of the estates is not adapted. *Idem*, 78; *Et vid.*, *Lord Say and Sele vs. Jones*, 3 Bro. P. C., 113; 8 Vin. Abr., 262; *Shapland vs. Smith*, 1 Bro. C. C., 75; *Silvester vs. Wilson*, 2 T. R., 444; *Venables vs. Morris*, 7 T. R. 342, 438.

"Thus stood the law with respect to the rule in *Shelley's case*, when the famous case of *Perrin vs. Blake* arose, before the court of king's bench, in the year 1769; a case which, how much soever it has been regretted as having for a time unsettled the law with regard to this celebrated rule, yet has, in the end, been productive of the most important benefits to the profession, by having given rise to the admired essay, from which the preceding observations have been

chiefly extracted. The case was this:—One W. Williams seised in fee of a plantation in Jamaica, devised in the following words:—‘Should my wife be *enseint* with child, at any time hereafter, and it be a female, I give and bequeath unto her the sum of 2000*l.* &c.; and, if it be a male, I give and bequeath my estate real and personal equally to be divided between the said infant and my son John Williams, when the said infant shall attain the age of twenty-one. Item, It is my intent and meaning, that none of my children should sell or dispose of my estate for longer time than his life; and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son John Williams and the said infant, for and during the term of their natural lives, the remainder to my brother-in-law, J. G. and his heirs, for and during the lives of my son John Williams and the said infant, the remainder to the heirs of the body of my said sons John Williams and the said infant lawfully begotton, or to be begotten, the remainder to my daughters, &c.’ *Perrin vs. Blake*, 4 Burr., 2579; 1 Bl. Rep., 672; Dougl., 329; 1 Hargr. Law Tracts, 490. No other son was born; and the question was, what estate John Williams took under this will? Had this been the case of an *executory trust*, says Mr. Fearne, the court of chancery might possibly have construed it an estate for life in J. W., upon the clause expressing the testator’s will, that his sons should not convey a greater interest than for their lives. But as it was the limitation of a legal and not a trust estate, the court of chancery itself (in conformity to its own established distinctions explained in the above mentioned cases of *Leonard vs. Earl of Sussex*, 2 Vern., 526; *Glenorchy vs. Bosville*, Cas. Temp. Talb., 19; *Bagshaw vs. Spencer*, 2 Atk., 581; 1 Ves., 149), we may suppose,

would have decreed it an estate-tail in J. W. The court of king's bench, however, in the case of Perrin vs. Blake, treated those distinctions as too refined; and adjudged, that J. W. took only an estate for life, under the devise in question. A writ of error was brought upon this judgment in the exchequer chamber; in which the judgment was reversed by the opinion of seven judges against one; so that, upon the whole, eight judges were of opinion that John Williams took an estate-tail; and four, that he took only an estate for life. An appeal was brought to the house of lords from the judgment of reversal in the exchequer chamber; but the parties at length compromised the dispute.

"The subsequent cases of Hayes vs. Foorde, 2 Bl. Rep., 698; Hodgson & Ux. vs. Ambrose, Dougl., 337; 3 Bro. P. C., 416; Jones vs. Morgan, 1 Bro. C. C. 218, 219; Thong vs. Bedford, 1 Bro. C. C., 313, and the recent decisions above cited under their respective heads, have again restored the doctrine respecting this celebrated rule to its former authority. And it is now finally settled, that 'neither an intent manifested by the testator to give only an estate for life, nor the interposition of trustees to preserve contingent remainders, nor mere words of condition, describing the order of succession in which the devisees are to take place, nor the introduction of powers of jointuring, or of liberty to commit waste, are of themselves sufficient to vary the technical sense of the words used. It must plainly appear that the testator did not mean to give such an estate as would pass under the words used, unless controlled by such apparent intent.' *Per* Lord Alvanley, C. J. Poole vs. Poole, 3 Bos. & P., 620, 627. In order to ascertain the testator's presumable inten-

tion, in his use of the words, heirs, &c., we cannot refer the student to a better medium than the principles laid down by Mr. Hargrave, in his masterly observations on the rule in Shelley's case. That profound writer observes, that when it is once settled, that the donor or testator has used words of inheritance according to their legal import; has implied them intentionally to comprise the whole line of heirs to the tenant for life; and has really made him the terminus or ancestor, by reference to whom the succession is to be regulated; then it will appear, that being considered according to those rules of policy from which it originated, it is perfectly immaterial whether the testator meant to avoid the rule or not; and that to apply it, and to declare the words of inheritance to be words of limitation, vesting an inheritance in the tenant for life as the ancestor and terminus to the heirs, is a mere matter of course. That on the other hand, if it be decided, that the testator or donor did not mean by the words of inheritance after the estate for life, to use such words in their full and proper sense; nor to involve the whole line of heirs to the tenant for life, and include the whole of his inheritable blood, and make him the ancestor or terminus for the heirs; but intended to use the word heirs in a limited, restrictive, and untechnical sense, and to point at such individual person, as should be the heir, &c., of the tenant for life at his decease; and to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the groundwork for a succession of heirs; and constitute him or her the ancestor terminus and stock for the succession to take its course from; in every one of these cases the premises are wanting, upon which only the rule in Shelley's case interposes its authority, and

that rule becomes quite extraneous matter. The previous inquiry, therefore, will be, whether, by a remainder to the heirs, either general or special, of a preceding tenant for life, it is the meaning of the instrument to include the whole of his inheritable blood, the whole line of his heirs; or to design only certain individual persons answering to the description of heirs at his death. If the former is the sense, the rule always applies; and, by vesting the remainder in the tenant for life, forces it to operate by limitation, even though the instrument should contradictorily and inconsistently add in express terms, that the remainder shall operate as a contingent one, and enure so as to make the heirs purchasers. If the latter sense is adopted, the rule is as invariably foreign to the case; and the remainder consequently is contingent till the death of the tenant for life, upon which event his heir takes it by purchase. 1 Hargr. Law Tracts, 575, 577. This idea of the rule, which will be ever admired for its simplicity and clearness, has been confirmed by Lord Thurlow, in his determination in the case of *Jones vs. Morgan*, 1 Bro. C. C. 220, and by Mr. Fearne, in his elaborate Essay on Contingent Remainders."

SECTION 82. LEGAL AND EQUITABLE ESTATES.

A classification of estates not yet referred to is that of legal and equitable estates. This subject has so far been taken up with the treatment of legal estates.

An equitable estate is one where there is a separation of the legal title and the beneficial use, and which a person known as the trustee holds for the benefit of the other person known as *cestui que trust*.

Trust is a separate subject in this work,⁶ and to

⁶ Vol. 7, Sub. 21.

avoid repetition on matters relative to equitable estate, including the subjects of contingent, springing and shifting uses, will be taken up at that place. The rule against perpetuities, and the rule against accumulations, will also be treated under that subject.

SECTION 83. TESTAMENTARY CONVEYANCES.

The law is much more liberal as to conveyances by will than as to conveyances by deed. Many conveyances which would be void if created in a deed are valid if made by will. Such conveyances are known as executory devices and will be considered under the subject of wills.⁷

SECTION 84. MERGER.

A merger is the absorption of a smaller estate into a greater. A merger will take place where two estates come into the possession of the same party, where there is no intermediate estate and where the interests of third persons will not be affected by such merger.

⁷ Vol. X, Subject 32.

CHAPTER X.

FORMS OF CONVEYANCES.

SECTION 85. IN GENERAL.

“All of the various forms of deeds now in common use in this country derive their origin from the land and conveyancing system of Great Britain, and are but modifications of two species, one of which was developed by the common law, while the other was created under the operation of the statute of uses. From these two species the conveyancers evolved a number of divergent and complex forms, characterized, in the main, by much ingenious subtly and legal refinement.”¹

SECTION 86. COMMON LAW ORIGINAL DEEDS.

The original method of transferring land under the common law was by what was known as livery of seisin,² without any written deeds, these only coming in at a later period. Five forms of original land conveyances were recognized by the law writers: Feoffment, gift, grant, lease, exchange and partition.

Feoffment was used to create estates in fee-simple; gift to create estates in fee-tail; grant to create an incorporeal hereditament; lease to create an estate less than fee-hold.

SECTION 87. COMMON LAW DERIVATIVE DEEDS.

Five forms of derivative conveyances were also recognized: release, confirmation, surrender, assignment, and defeasance.

¹ Warvelle on Real Property, page 319.

² See Chapter I on this subject, and also subject of Legal History, Vol. I of this series.

A derivative conveyance was one which operates in connection with some former conveyance. A release was used by a party with an interest in land, but not the present possessor, to give up his interest to the person in possession. A surrender was to a certain extent the reverse of this, being used by the tenant in possession to give up his estate to the remainder-man. A confirmation was a deed used to perfect a former imperfect grant. A defeasance was a deed used in connection with some other deed, and provided that under certain circumstances it should become void. An assignment is used by a person to transfer his interest under a deed to another.

SECTION 88. EFFECT OF STATUTE OF USES UPON THE ENGLISH LAW OF CONVEYANCING.

The history of the Statute of Uses and its effect upon the law of uses and trusts is discussed under the subject of Trusts.³ A collateral and entirely unexpected effect of the statute was its revolutionizing of the English law of conveyancing. Prior to the passing of this statute it had been impossible to transfer the legal title to real estate without livery of seisin. It had, however, been possible for a person by a written instrument to declare himself the trustee of lands of which he was the legal owner, for the benefit of another party. The statute of uses had the same effect in such cases, of transferring the legal title to the person who held the beneficial use. It thus became possible to transfer the legal title by a written deed without livery of seisin.

The deed transferred the beneficial use and the statute the legal title.

³ Vol. 7, Sub. 21.

Two forms of conveyances immediately arose under this statute; the covenant to stand seised to uses and the deed of bargain and sale. The deed of bargain and sale required a valuable consideration, while a good consideration *i. e.*, that of blood and affection (was sufficient in the case of the covenant to stand seised. The necessity for a consideration in a deed originated with the deed of bargain and sale. It has, in the main, served as a basis for the modern form of deed.

Shortly after the passing of the statute of uses, there was enacted the statute of enrollments, which required the registration of all deeds of bargain and sale. To avoid both registration and livery of seisin, a new form of conveyance, known as the Lease and Re-lease was invented. By the lease, which as it did not transfer a freehold did not require a livery of seisin. The vendee could be put in possession of the land and then a release of the grantor's remaining interest could be made to him.

Two of the forms of deeds growing out of the statute of uses, were deeds to declare the uses of another more direct conveyance and deeds of revocation of uses.

SECTION 89. MODERN DEEDS.

The system of modern deeds will be fully explained under the subject of Abstracts, and need only be mentioned at this point. The two main forms of modern deeds are warranty deeds ⁴ and quit claim deeds.⁵ The main difference between these two is that a quit claim deed merely purports to transfer all

⁴ For a copy of this form of deeds, see Appendix C.

⁵ Id.

the interests of the grantor, while a warranty deed warrants the title to be as represented.

Fiduciary deeds are deeds made by duly authorized agents, and are treated under the subject of Abstracts.

SECTION 90. CONVEYANCES IN TRUST OR BY WAY OF PLEDGE.

Conveyance in trust will be treated under the subject of Trusts,⁶ and conveyance by way of pledge, under the subject of Equity Jurisprudence.⁷

⁶ Volume 7, Subject 21.

⁷ Volume 7, Subject 20.

EIGHTEENTH SUBJECT.

Abstracts.

BY

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ABSTRACTS OF TITLE.

SECTION 1. DEFINITIONS.

There is now in general use throughout the United States, in connection with sales and conveyances of land and other forms of real property, what is popularly known as an "Abstract of Title." Both the name and the ideas which it denotes are borrowed from the legal system of Great Britain, yet, like many of the terms derived from English law, an American abstract is something very different from its English prototype.

An Abstract may be defined as a condensed history of the title to land, consisting of a synopsis or summary of the operative parts of all of the various instruments of conveyance which in any manner affect said land, or the title thereto, or any interest therein, together with a statement of all liens, charges and incumbrances thereon, or liabilities to which the same may be subject, and of which it is in any way material for purchasers to be apprised.¹ It is usually arranged in chronological order and is intended to show the origin, course, and incidents of title without the necessity of referring to the original sources of information.

In England the abstract is compiled from the original documents, to which it stands in the nature of a well arranged index, but in the United States it is prepared from the documents only as they appear upon the public records.

¹ Warvelle on Abstracts (3d Ed.), p. 2. This is the leading work upon the subject. References

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SECTION 2. THE ENGLISH METHOD.

The differences between an English and an American abstract will be better understood by a comparison of the two systems.

It has long been the practice in England, on a sale of land, or other property which does not pass by a mere delivery but is held by a title depending on documentary evidence, for the solicitor for the vendor to prepare and deliver to the vendee an abstract of the various matters upon which the vendor relies to sustain his claim of ownership. This would consist of a synopsis of the deeds, wills, etc., which constitute the vendor's chain of title, together with such extraneous facts as may be relevant to such title, as certificates of marriage, baptism, burial, etc., in connection with pedigrees or family histories.

The abstract is invariably prepared from the original documents, the vendor, as a rule, retaining such of his title deeds as relate to or cover other property than that sold, as also all other documents until consummation of sale. The purchaser, however, is usually permitted to compare the abstract so furnished with the documents from which it is compiled, in order that he may see that it contains a correct and faithful statement of all circumstances disclosed by them which may in any way affect the title.

When the abstract is delivered to the purchaser he is required to found thereon such "requisitions," by way of further inquiry or objection, as he may think proper, and in default thereof, within a limited time, he will be deemed to have accepted the title. The inquiries and objections, when made, are answered by statements and observations, signed by the vendor or his solicitor, and all become a part of the abstract.

This was the method introduced into the American colonies, and out of which has grown our present system of abstract compilation. But the methods now pursued in this country bear but slight resemblance to those just described, as will be seen from the following:

SECTION 3. THE AMERICAN METHOD.

The spirit and operation of our land laws, as well as the many legal usages peculiar to the United States, preclude the adoption of the English methods in this country. Our system of registration, with its attendant doctrine of constructive notice, has rendered comparatively unimportant the original documents, and has thrown upon the purchaser the burden of examining the public records. To discharge the legal duty thereby occasioned and at the same time to obviate the necessity of a personal search of the records, there has been developed the modern American abstract.

During the earlier years of our history but little attention was paid to title in purchases of real property. Usually the vendee was fully satisfied with the vendor's warranty deed, the covenants thereof being taken as conclusive evidence of all the facts they recited. No inquiry was made with respect to the past, present possession being considered a sufficient guaranty of ownership, and no thought was had as to the future. Transfers of land were frequently accompanied by the vendor's purchase deeds and other muniments upon which the title was based, according to the English practice, and such may still be the custom in some parts of the country.

But with the increasing commercial activity of the age, and the removal of impediments to alienation,

has come a vast accumulation of evidences of title, frequently involving complex interests that call for a high degree of skill to arrange and classify, as well as to interpret and adjust. Land, too, in many localities has acquired an almost fabulous value and purchasers now part with their money only on strong assurance of title. It is no longer practicable, however, save in rare instances, to examine title by specific inspection of the original documents, were such always available, or to laboriously follow on the records the various mutations through which it has passed. Yet, as purchasers take at their peril, save as they may find protection in the covenants of their deeds, it is necessary that, in some way, they should be apprised of whatever may affect the validity of the title or estate they take, of which the law charges them with actual or constructive notice. And so, to satisfy this demand, we now have the modern abstract of title.

In compiling an abstract, the examiner simply collects, condenses and arranges the information found of record, without, as a rule, any expression as to the rights of any of the parties named therein. The work is then turned over to counsel, who critically examines each instrument shown or statement made; decides upon the sufficiency and legal effect of the conveyances, noting any defects or irregularities therein, or in any of the proceedings necessary to divest or acquire title; determines the relative rights and legal relations of the parties to the land in question and to each other; and finally formulates his views in a written opinion which is often annexed to the abstract, and on the strength of which future sales and other dispositions of the property are usually made.²

² Warvelle on Abstracts, p. 5.

SECTION 4. ESSENTIALS OF AN ABSTRACT.

As a general proposition, an abstract should furnish all the material information contained in the original documents and records from which it is compiled, and that, as fully and completely as if they had been specifically inspected. It should show, when from the source of title, the inceptive measures by which the government, either National or State, was divested of the original title. This is the foundation of all derivative rights in the individual. Then should follow, in regular chronological sequence, the devolution of the title from the government to the present claimant of the land, which would include all transfers of any and every interest. It should further show any and all adverse interests, titles or claims of record; all liens, charges and incumbrances, however created, including judgments against the person during the period the law makes them a lien on land; all unpaid taxes, special assessments and statutory liens, and every other matter or thing appearing of record that may in any way affect, implicate or impair the title. To these, in proper cases, may be added any extraneous matter, or as usually termed, matter *in pais*, that to the examiner may seem pertinent or material.

It will thus be seen that the scope of inquiry of an American abstract is much broader than the English document of the same name, and, hence, many American abstract makers prefer to designate their work as an "Examination of Title," to distinguish it from the narrowness of view and singleness of purpose contemplated by the English methods. The English abstract is largely personal in its object. That is, it seeks to show only the title of some particular individual, rather than the general condition of the title, and is

usually expressed in the caption to be "An abstract of the title of John Doe, Esq., to that certain messuage," etc. So, too, as the nature of English land tenures and the peculiar conditions attending the ownership of real property in that country preclude a showing of the origin or course of title for any considerable period, an English abstract generally commences with some specific document, and from this point, called the "root of title," covering a period of at least forty years, shows the successive links that connect the present claim of title of the person proposed with the "root." Obviously, such an abstract, however well it might serve the purpose in England, would be most inadequate in the United States, where several persons frequently claim title through different channels from the same source, not to mention the many adverse titles springing from independent sources. While the American abstract is intended primarily to show the present state of the vendor's title, it does not in terms purport such purpose, but is a general inquiry into every matter or thing in any way affecting title to the land, in whomsoever it may rest, and however arising or acquired. The caption of the American abstract expresses its true purpose, as "An examination of title to the North East quarter," etc. It has none of the personal features that characterize the English abstract.

SECTION 5. EXAMINER'S DUTIES AND LIABILITIES.

The degree of intelligence and skill required of a man by law, depends much upon his calling. A professional man must be specially educated or fitted for the duties of his vocation, and in addition to the requisite technical knowledge must have reasonable

skill in its application. So the understanding implied from persons engaged in the business of searching the public records, examining titles to real property, and making abstracts thereof for compensation is, that they are possessed of the requisite knowledge and skill and will exercise due and ordinary care in the performance of their duties.³ For a failure in either of these respects, resulting in damages, the party injured is entitled to recover.⁴ Nor can the examiner limit his liability by a clause in the certificate appended to the abstract without specifically calling his client's attention to it.⁵ It does not seem, however, that the employment involves any elements of guaranty or indemnity further than that raised by the undertaking to bring to the discharge of the duty reasonable skill and diligence.⁶ That is, he should make a full and true search; should examine the record of every matter shown upon his own or the public indices which affects the land in question; should accurately digest or abstract every instrument or other matter so found, and should supplement his search by an explicit statement or certificate of all matters covered by it.

But to fix the liability of the examiner there must, as a rule, be privity of contract with the injured party, for he can be held answerable for his errors only to the person who has employed him, and where, in the absence of fraud, collusion, or falsehood, the examiner has made an erroneous certificate, upon the strength of which a third person has loaned and lost money, or suffered other injury, no liability will attach, notwithstanding the fact that the money was advanced on the

³ Chase vs. Heaney, 70 Ill., 268;
Lattin vs. Gillette, 95 Cal., 317.

⁴ Security Co. vs. Longacre, 56
Neb., 469; Clark vs. Marshall,
34 Mo., 429.

⁵ Chase vs. Heaney, 70 Ill., 268.

⁶ Dundee Mfg. Co. vs. Hughes, 20
Fed. Rep., 39; Schade vs.
Gehner, 133 Mo., 252.

assurances of the abstract, and to the person who caused the same to be made.⁷ On the other hand, the owner of land seldom incurs the expense of procuring an abstract of title except for the purpose of thereby furnishing information to some third person who is to be influenced by the information thus provided. Hence, it is contended, if the abstract maker shall in all cases be held responsible only to the person under whose employment he performs the service, it is manifest that the loss, if any, occasioned thereby, must, in many cases, be without remedy. Acting upon this line of reasoning, we may observe a tendency in some of the cases to extend the abstractor's liability and to give to any one, who in good faith relies upon the statements of the abstract, a remedy against him for any loss that may have resulted from his errors or omissions.⁸ The general rule, however, and that sustained by the weight of authority, is as first stated, and in most of the cases that seem to militate against it there are special circumstances tending to create privity, or such other relation as gives to the injured third party a right of redress.⁹

It has further been held, that the examiner is under no obligation to show anything not arising within the dates of his search, even though it be at the time a valid and subsisting lien upon the land; nor is he bound to inquire or state whether the title vested in any grantee during the period covered by his examination was affected by any prior conveyance, or any estoppel growing out of any covenants therein.¹⁰

With respect to this branch of our subject, a dis-

⁷ *Savings Bank vs. Ward*, 100 U. S., 195; *Talpey vs. Wright*, 61 Ark., 275.

⁸ *Dickle vs. Abstract Co.*, 89 Tenn., 431.

⁹ *Slewers vs. Commonwealth*, 87 Pa. St., 15.

¹⁰ *Wakefield vs. Chowen*, 26 Minn., 379.

tion must further be kept in mind between persons engaged in the business of compiling abstracts as an ordinary occupation and public officers who furnish same as a part of their official duty. Abstracts are frequently made by recorders, clerks, and prothonotaries, and in some states their liability is prescribed and regulated by statute. Under these statutes such officers are often declared liable for all loss or damage which may happen by reason of any false or erroneous certificate. But where an officer is not bound to make searches of the records of his office his liability would seem to be measured by the same rules that apply to abstracters generally.

SECTION 6. DUTY OF FURNISHING ABSTRACT.

In England, a purchaser may, it seems, require to be furnished with an abstract of the seller's title, even though he may already have agreed to accept the same, and he may retain such abstract during the negotiations upon, and even after the rejection of, the proffered title, until the dispute is finally settled, for the purpose of showing the grounds of such rejection. It will be remembered, however, that an English abstract is generally only a digest of the title deeds and muniments relied on by the vendor to establish his claim, and which usually accompany the abstract for examination and comparison. The abstract so furnished, therefore, is rather in the nature of an index to accompany documents, and is prepared primarily for their more convenient and systematic perusal. An American abstract, on the contrary, is intended to furnish within itself a full exposition of title, and to obviate the necessity of referring to the original sources of information. In the former case the deeds and

muniments are in the hands or under the control of the vendor, and the reason of the English rule is apparent from this fact alone. But in the United States the changed conditions of the evidences of title, the system of registration, the actual and constructive notice imparted thereby, and the access which the purchaser has to information concerning the title, would seem to render inoperative the English rule by removing the reason which occasioned it; and, while it is customary in this country, as in England, for the vendor to prepare and furnish an abstract of title, either pending or after consummation of the sale, it does not appear that this can be demanded as a matter of right, but is rather the result of the contract or conditions of sale.

In England, where titles are not registered as in this country, the vendor, in order to show performance or an offer to perform on his part, whether in an action at law for the purchase money or a suit in equity to compel performance by the vendee, must affirmatively prove his title. In this country, where titles are matters of record, and at all times open for inspection, a different rule prevails. This doctrine has often been announced in actions by the vendor for the purchase money,¹¹ and it has been expressly held in equity that a vendor may rely upon his tender of a deed without producing the evidences of his title, the burden being upon the purchaser to show such a defect as would justify him in refusing to accept such deed.¹²

But while the furnishing of an abstract cannot be said to be demandable as a matter of legal right, even where a custom to that effect may prevail, it is nevertheless made a condition precedent, in most sales, by

¹¹ Little vs. Paddleford, 13 N. H.
167.

¹² Espy vs. Anderson, 14 Pa. St.,
308.

the express agreement of the parties. Where parties make a contract for sale or exchange of lands which provides for the exhibition of an abstract showing title in the proposing parties by a day named, this is a condition precedent to be performed before either party in case of an exchange, or the vendor in case of sale, can call upon the other to perform the agreement; and, if the abstract is not satisfactory or fails to show the title agreed to be produced, the other may elect to consider the contract at an end.¹³

If, on the sale of land, it devolves on the vendor to furnish an abstract, on the delivery and acceptance of the deed it becomes the property of the purchaser,¹⁴ and so, where the owner of land, about to execute a mortgage, delivers to the mortgagee an abstract of title to the premises, it becomes a part of the security for the loan, and the mortgagor is not entitled to the possession of it until the mortgage is paid or discharged.

SECTION 7. SOURCES OF INFORMATION.

An abstract of title, as compiled in the United States, is an abridgment of the public records, to which it also bears the relation of a special index, they being the great repositories of title and the source from whence the examiner draws the greater part of his information.

A record, it has been said, is a written memorial made by a public officer, authorized by law to perform that function, and intended to serve as evidence of something written, said or done. The acts of Congress and of the State Legislatures are the highest types of records, while the proceedings and determinations of

¹³ *Howe vs. Hutchinson*, 105 Ill., 501.

¹⁴ *Chapman vs. Lee*, 55 Ala., 616.

the courts are scarcely less in dignity, and by statutory enactment the enrollment of deeds, though made primarily to perpetuate the memory of the facts which they recite, is given the operation and effect of records. These records are of controlling efficacy in the State where made, and by the Constitution of the United States it is declared that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." In matters of sales and conveyances of lands, records acquire a new importance from the peculiar American doctrine of constructive notice, which casts a knowledge of their contents and import upon subsequent purchasers, and forms one of the chief incentives to the production of abstracts.

Under the general name of records are classed all official acts of the public officers in relation to title; the adjudications and determinations of courts; ministerial acts of officers in furtherance of the taxing power, and incidentally all papers, whether filed or engrossed, which affect title by relation and through operation of law. Popularly, the term is applied to the registry of deeds rather than to the other classes mentioned; but all come within its signification, so far, at least, as the purpose of abstract making is concerned, and from all these varied sources the examiner draws the details which go to make up a full exposition of the title. The registry of deeds furnishes the most fruitful field, and the great bulk of the examination is drawn therefrom, but recourse must also be had to the government archives, the transactions of the State Legislature, the files of the courts, ordinances of the municipality, and acts of the officers exercising the ministerial duties of taxation.¹⁵

¹⁵ Warvelle on Abstracts, 69.

SECTION 8. DOCTRINE OF NOTICE.

As before remarked, the modern abstract owes its existence largely to the doctrine of notice. This doctrine may be briefly explained as follows:

The principle is well established, that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title, which could be discovered by an examination of the deeds or other muniments of title of his vendor, and of every fact, as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted. If there is sufficient contained in any deed or record, which a prudent purchaser ought to examine, to induce inquiry in the mind of an intelligent person, he is chargeable with the knowledge or notice of the facts so contained, and, generally, a party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry suggested by such information, diligently prosecuted, would have disclosed to him.¹⁶ The purchaser must be presumed to investigate the title, and to examine every deed or instrument forming a part of it, especially if recorded, and to make inquiries *in pais* as well as look at records.

Notice is classed as either actual or constructive, but there is no difference between them in regard to the legal consequence or effect. In this country it has been uniformly held that the record of a conveyance, executed in conformity to law, operates as constructive notice to all subsequent purchasers or incumbrancers, claiming under the same grantor, of any estate, either legal or equitable, in the same property, provided the conveyance be one which the law requires or authorizes to be recorded;¹⁷ and such purchaser is charged with

¹⁶ Cambridge Bank vs. Delano, 48 N. Y., 326; Wilson vs. Hunter, 30 Ind., 466.

¹⁷ Tilton vs. Hunter, 29 Me., 29; Crockett vs. McGuire, 10 Mo., 34.

the duty of exercising diligence in making proper examination touching the rights and equities of others, where the record shows that others have such rights, in the lands he is about to purchase.

A subsequent purchaser is not chargeable with constructive notice of all instruments of record, by whomsoever made, but only of such as lie in the apparent chain of title, or have been made by some one in some way connected with property involved in interest, and brought to his notice. Hence, he is not bound to look for conveyances by or judgments against one in whom the record shows no title.

The doctrine of constructive notice under registration laws has always been regarded as a harsh necessity, and the statutes which create it have always been subjected to a rigid construction. Therefore, only the facts as they appear on the face of the record are deemed binding on subsequent purchasers, and if, from any cause, the real facts are there misstated, as if the wrong land is by mistake described, or the sum for which a mortgage is given is inadvertently omitted, a subsequent purchaser in good faith, relying upon what is shown, will not be affected by the error or omission.

That which a person actually sees, or which is specifically brought to his attention, creates an actual notice of the fact. But the general doctrine of actual notice is much broader than this. Where a purchaser has knowledge of any fact sufficient to put a prudent man upon an inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry, and if he does not make it, he is guilty of bad faith or negligence to such an extent that the law will presume that he did make it, and

will charge him with the actual notice he would have received if he had made it.¹⁸

Open, notorious and exclusive possession of land imparts notice of the title of the person in possession, and of every fact which the purchaser might learn by inquiry.¹⁹ But while it is true, that the law regards the actual occupancy of land as equivalent to notice of the claim of the occupant, to all persons dealing with the title, yet this is not an absolute proposition, which is to be taken as true in all possible relations. The known circumstances may be such that the occupancy will not suggest to a purchaser an inquiry into the title or claim of the occupant, and when the inquiry may be omitted in good faith and in the exercise of ordinary prudence, no one is bound to make it. Possession out of the vendor and actually in another person ordinarily suggests an inquiry into the claim of the latter, and a failure to make such inquiry evinces gross neglect, but the question in all such cases is one of actual notice, and such notice will be imputed only where it is a reasonable and just inference from the visible facts.²⁰

As distinguished from constructive notice, actual notice consists in express information of a fact brought home to a party, or a knowledge of circumstances which should lead him to a knowledge of such fact. Its existence is always a question of fact, open to rebuttal or explanation, while, on the other hand, constructive notice is a presumption of law which cannot be rebutted.

SECTION 9. REGISTRATION.

By the American system of registration deeds of conveyance of any interest in lands, when duly recorded

¹⁸ Cambridge Bank vs. Delano, 48 N. Y., 326.

¹⁹ Tankard vs. Tankard, 79 N. C., 54.

²⁰ Pomeroy vs. Stevens, 11 Met. (Mass.), 244.

in conformity with the law of the State where such land is situate, have the dignity and effect of records, and to them much of the stability of our land titles is attributable. Such record not only serves as a means of preservation of the muniments and evidences of title, but also has the effect of giving to the transfer that notoriety formerly obtained by livery of seizin, to which it is made equivalent in some of the States by statute. The statutes of registration bear a close similitude in all the States, and provide generally for the recording of every instrument in writing by which any estate or interest in land is created, aliened, mortgaged or assigned, or by which the title to land may be affected either in law or in equity.

It is a general provision of the recording acts, that every conveyance which shall not be recorded as provided by law, shall be void against any subsequent purchaser in good faith, and for a valuable consideration, of the same land, or any portion thereof, whose deed of conveyance shall be first duly recorded; and further, that every instrument recorded in the manner prescribed by statute, shall, from the time of filing same for record, impart notice to all persons of the contents thereof. As previously remarked, however, the constructive notice afforded by the record of a deed, applies only to those who are bound to search for it; as subsequent purchasers, and all others who deal with or on the credit of the title, in the line of which the recorded deed belongs. That such record imparts notice is to be understood also, in the sense that the contents of the deed are correctly spread upon the record, for the recording acts cannot be made by equitable construction to embrace cases not within them, or give constructive notice of things the records do not show.

It would further seem, that instruments to impart notice, must be recorded in the proper books. Thus, where separate books are provided for deeds and mortgages it has, in some instances, been held that a mortgage recorded in a book of deeds will not furnish constructive notice.²¹ So, also, the registry of an instrument not required by law to be recorded is notice to no one,²² and, usually, a deed is not constructive notice merely because it is copied into the registry if it has not been duly executed, acknowledged or proved, so as to entitle it to registration,²³ although such an instrument would be effective as to all persons who have actual notice of its contents.²⁴

Registration, in legal intendment, is conclusive notice to the parties to be affected by it. But notice of a prior unrecorded deed, communicated to a purchaser, will prevail over a subsequent recorded deed, and as between the immediate parties no registration is necessary, an unrecorded deed having the effect to convey the legal title as against all persons having actual notice of its existence.²⁵

SECTION 10. INDEXES AND REFERENCES.

No perfect abstract of title can be compiled without the assistance of a carefully prepared tract index, that is, an index to the lands. This book is not usually kept by the recorder of deeds, and about the only helps afforded in the public offices are a series of alphabetic-

²¹ Cady vs. Purser, 131 Cal., 552.

²² Galpin vs. Abbott, 6 Mich., 17;
Sigourney vs. Larned, 10 Pick.
(Mass.), 72.

²³ Loughridge vs. Bowland, 52
Miss., 546; Pringle vs. Dunn,
37 Wis., 449; Bishop vs.
Schneider, 46 Mo., 472.

²⁴ Bass vs. Estill, 50 Miss., 300;
Musick vs. Barney, 40 Mo., 458.

Where upon the records a defective deed is found and is seen, this must be regarded as actual notice, such as every reasonable and honest man would feel bound to act upon. Hastings vs. Cutler, 25 N. H., 483.

²⁵ Musgrove vs. Bonser, 5 Ore., 313.

ally arranged indexes. When well kept these books will be of much assistance to any one making a search of the records; if otherwise, however, they may prove very misleading. The grantor and grantee indexes of the registry of deeds will show the successive conveyances and incumbrances under the names of the various parties who at different times have held title, where there has been no break in the chain, together with the volume and page of the record on which the instruments may be found. Adverse deeds, unless within the knowledge of the person making the search, can rarely be found by this method. If only an index to grantors is provided it will be almost impossible to detect adverse deeds. Should a brief description of the property be carried out, as is frequently the case, ending with the section, town and range in proper columns, these columns should always be carefully run down for any conveyances that may have escaped the searcher's attention while going over the names.

While it may be the duty of the recorder to keep a proper index of his books of registration, so that one searching the records may easily find what is contained therein, yet a deed of conveyance properly filed and copied on the records is recorded within the meaning of the law, and imparts notice to subsequent purchasers, notwithstanding the failure of the recording officer to index it. The better way, in all cases of moment, is to apply to a regularly established abstract maker for assistance.

SECTION 11. COMPILATION OF ABSTRACTS.

Examinations of title in the United States, which are usually prepared by professional examiners, do not, as a rule, disclose, except inferentially, any matter or

thing affecting title save what appears of record, and searches are mainly restricted to the public records of the county. Ordinarily this is sufficient, and a careful search will reveal all that is necessary to a correct estimate of title, and fully protect intending purchasers.

An examination, upon its face, purports to show the course of title from a definite date to another definite date, and the fair and reasonable import of the undertaking is, that the examiner has made a full and true search relative to the title during that period, and has noted on the abstract every transfer, or other matter, affecting the same, actually made and entered of record between those dates.

Sometimes the examiner may present a synopsis of deeds simply for the purpose of showing, like the English abstract, the present title of some specified person. In such case the chain usually commences at some given point as the root. In a case of this kind unusual care is required, lest a prior conveyance operating by way of estoppel, may not defeat the title shown. It is customary, in an examination of this kind, to commence with a deed showing title in the person proposed or his grantor, and thence continuing down to the date of the certificate. There is not wanting authority to support an examination of this character, and it has been held that a deed recorded before the grantor has any record title may be safely disregarded in examination of title, under the system of registration and notice adopted in the different States of the Union; that such a deed would not be constructive notice to any innocent purchaser; and further, that a purchaser finding an apparently valid title of record is not expected to look behind it. The rule, however, is unsafe and does not prevail generally. If the ex-

aminer is directed to commence his search at a given period, or with a specific event in the devolution of title, he will, of course, discharge his whole duty by a true showing of what has transpired since that time or event, but a purchaser will thereby assume a risk.

In some localities it is, or has been customary to dispense with a formal abstract, and in its stead the examiner merely "certifies the title" to be vested in an individual named, basing his certificate upon a personal examination of the records. This is merely an opinion of title, and its worth depends wholly on the learning, skill, and financial responsibility of the person rendering it.

SECTION 12. FORMAL PARTS OF AN ABSTRACT.

An abstract should be prepared in a neat and orderly manner, and so disposed as to facilitate the labor of counsel in passing an opinion on the title. A formal caption should apprise the reader at the outset of the subject of the examination, while the different searches should be arranged under classified heads, and for purposes of convenient reference the various statements should be numbered consecutively from the beginning. As far as possible the chronological sequence of the conveyances should be preserved. The result of the search should be recapitulated at the conclusion by a certificate covering all the essential features of the examination. The formal parts should be brief and yet explicit.

The object of the caption is to definitely describe the subject of the examination. The caption, therefore, should consist of a full description of the parcel or parcels of land under examination, and the time from which the search is made. Where the examination

commences at the source of title, as where a devolution from the United States is shown, no announcement of the time from which the search dates is necessary, but when any intermediate point is selected it is customary to indicate same.

The different conveyances and stages of title are usually shown in chronological order so as to present, as far as possible, a connected chain, and are numbered *seriatim* from the beginning. The liens and incumbrances when connecting title should be set forth in regular chronological order in conjunction with other instruments, and releases or discharges should immediately follow the incumbrance or lien which they purport to affect, irrespective of the time they bear date. The aim of the examiner should be to present, so far as may be, the course of title in unbroken sequence through whatever forms or instrumentalities it may pass. Judgments against the person, mechanic's liens, taxes and tax sales, are better shown after the course of title has been traced, in the shape of appendices and under appropriate heads. Decrees, judgments, orders affecting the land, and tax deeds, of course appear in regular order in the body of the abstract.

The result of the examiner's labors should be summed up in conclusion, by a brief recapitulatory and explanatory certificate, embodying the essential features of the search. It should be certain in its statements, leaving nothing to implication, and contain no more than is developed by actual investigation. If the examination is made from the records it should so state, enumerating the different classes examined, or describing the offices or depositories from which the information was obtained, but where it is made from indices kept by the examiner, it is customary to certify

from such indices. It should be signed by the examiner and dated, such date being usually the date of the examination.²⁶

SECTION 13. SUBSTANCE OF THE ABSTRACT—INITIAL STATEMENTS.

Whenever the abstract goes back to the foundation of title, in all cases of lands which originally formed a part of the National Domain, it should always commence with a brief note of the original entry of the land at the United States Land Office of the district in which the same is located, giving the name of the person so entering it, together with the date, and any other particulars that may appear and are pertinent. Should the entry from any cause have been cancelled and re-entry made, that fact should also be noticed, with date of cancellation and re-entry. Where parties have negligently omitted to record the Receiver's receipt, issued on the sale of the land at time of entry, or the patent, as is frequently the case, this forms the only item of information relative to the origin of the title. The entry itself, if valid, gives a right to the Register's certificate of purchase, and creates an equitable interest in the land. It is useful in showing the inception of title, and forms a symmetrical initial to the history which follows.

When the inception of title is through some grant of Congress, even though the immediate grants are from the State, the preliminary measures by which the State acquired its right to convey should appear as the preliminary statement of the abstract. A grant of public land by statute is the highest and strongest form of title known to our law. The original grant, there-

²⁶ Warvelle on Abstracts, *passim*.

fore, or so much thereof as may be necessary to show the conveyance, should form the initial statement of an abstract of title to land so derived. Coupled with this should appear so much of the official action of the State authorities as will show an acceptance on their part and a compliance with such conditions as may be imposed by the granting act. Public grants to States are usually of specified quantities but of unascertained location, which is determined by selection in accordance with the terms of the grant. A selection by the State has the effect of an entry of the land, and withdraws the tract from further disposal. And when a particular parcel of land is selected by a State, through its officers or other authorized agents, and such selection and location are approved by the United States, the title becomes perfect and attaches to the land selected.

The immediate title to Section sixteen, and in States west of the Missouri River to Section thirty-six as well, is derived from the State, although the original title comes from the Federal Government. These sections, in pursuance of a cherished policy of the government, are specifically appropriated to the use of common schools, which appropriation or reservation forms a part of the compact by which the State is admitted into the Union. Where the land lies in sections sixteen or thirty-six the formal introduction should show the devolution of title from the government.

In the West and Southwest, the title to land rests, in many cases, upon confirmed claims of inchoate rights derived from the governments which owned the soil prior to the conquest or cession, the method of confirmation differing considerably with locality. The rights of parties claiming under titles from the Spanish or Mexican governments are determined by special

commissioners appointed for the purpose, and by the United States courts, and such determinations are usually followed by patent. Whenever practicable, the decree of confirmation, or reference to it, should form the initial statement of the abstract and precede the patent.

It frequently happened that the advancing tide of immigration, not only pushed forward the adventurous pioneer and agriculturist beyond the line of the public surveys, but in many cases whole communities settled and formed a town or village. These settlements have been provided for by several acts of Congress. The preliminary measures attending the inception of the title of town and city property when acquired under the acts just mentioned should form the initial to the abstract and be shown with a reasonable degree of detail.

In the case of lands acquired through the common form of entry, the receipt of the Receiver of the district land office should follow the note of entry. While this receipt does not constitute title, it is yet evidence of an equitable interest, which, in many of the states, has been accorded a dignity and effect equal to a patent. Upon the strength of this receipt large investments were frequently made and great improvements commenced, while the land often passed through many hands before a patent had been issued.

Lands granted to the states for school and university purposes, as well as grants for internal improvements, are disposed of in much the same manner as the public lands of the general government. The special method of their disposal is regulated by express statute in each State. A certificate of sale of State lands is not sufficient to convey the fee, which, by analogy to

the doctrine of sales of Federal lands, remains in the State until patent has issued. It entitles the purchaser, however, to the beneficial interest in the premises, and is sufficient evidence of title to vest in him the same rights of possession, enjoyment, descent, transmission and alienation of the lands therein described, and the same remedies for the protection of said rights, as against all persons except the State, that he would possess if he were the owner thereof in fee.

The foregoing paragraphs have reference only to well ascertained beginnings of title, which may be traced with little difficulty from its source or fountain head. In all states west of the Alleghenies, with possibly the exception of Kentucky and Tennessee, this may be easily accomplished, and a purchaser may reasonably insist on the production of a chain of title from the government. Such, however, is not always done, and the examiner, from information furnished by the vendor, sometimes prepares a preliminary statement, resting mainly on tradition, in which is recited the condition and course of the title at some remote period, which is then followed by a regular examination. The time selected is usually twenty years prior to the commencement of the search. This is strictly in accord with the English precedents and is not without authoritative usage in the United States. Where information is difficult of access, or impossible of procurement from official or authentic sources, as is often the case in the Eastern States, such a practice might be followed as the only available method, leaving the keenness of counsel to detect flaws and call for further evidence on desired points; but in the states formed from the territories, where the rectangular system of

surveying and the efficient method of registration prevails, no good reason exists why a complete abstract, showing the inception of title, should not be produced. Where a preliminary sketch is given as the root of title the examiner should carefully specify all his sources of information, and if consisting only of hearsay or tradition, should expressly disavow all responsibility for the truth of the matters therein recited. The reader is thus apprised at the outset of the value to be placed on the statement.

SECTION 14. CONGRESSIONAL GRANTS.

Not a few titles have their foundation in Congressional or legislative grants, or are grounded on legislative confirmations of previously existing inchoate or equitable rights. A recurrence to these is necessary, even though a patent may appear, as in many cases a patent is only confirmatory evidence of prior claims and is conclusive only between the sovereign and the patentee or those in privity with him.

A grant of land by statute is the highest and strongest form of title known to our law, and does of itself, *proprio vigore*, pass to the grantee all of the estate of the government except what is expressly withheld. As a primary conveyance, however, it is not in general use, for, as a rule, the government parts with its title only by a patent. But when an act of Congress purports to convey land in words of present grant it is equally as effective as a patent and vests a perfect and irrevocable title.²⁷

Legislative grants and confirmations are usually followed by a patent, the issuance of which is specially

²⁷ Strother vs. Lucas, 12 Pet. (U. S.), 454; Ferrett vs. Taylor, 9

Cranch (U. S.), 50; Swann vs. Lindsey, 70 Ala., 507.

provided for in the granting act, yet the patent in most cases adds nothing to the force of the grant, but is merely confirmatory of what has preceded. If a claim be made to land with defined boundaries the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required and the confirmation will then immediately attach the title to the land segregated.²⁸

SECTION 15. PATENTS.

A patent of the United States is the form of conveyance by which the nation passes its title to the public domain, and is the highest evidence of derivative title known to the law. It is conclusive as against the government, and all persons claiming under junior patents or titles, until set aside or annulled by some competent tribunal. When delivered to and accepted by the grantee it passes the full legal title to the land, and carries with it the presumption that all the prerequisites of law have been complied with. When issued to a conferee of a prior foreign grant, a patent operates like the deed of any other grantor and passes only such interest as the government possessed. A patent issued on a confirmed foreign grant, is, therefore, in the nature of a conveyance by way of quitclaim.

A purchaser from one holding under a patent is not bound to look beyond the patent to learn if it was properly issued, for the instrument is in itself presumptive evidence that all prior proceedings are legal,²⁹ but every purchaser is presumed to have notice of any

²⁸ Langdeau vs. Hanes, 21 Wall. (U. S.), 521; Dean vs. Bittner, 77 Mo., 101.

²⁹ Barry vs. Gamble, 8 Mo., 88; Winter vs. Crommelin, 18 How. (U. S.), 87.

defect of title apparent upon its face, and is chargeable with notice of whatever the patent recites.

It will often happen that a patent has been duly issued and delivered to the patentee, but through neglect has not been placed on record in the registry of deeds of the county where the land is situate. To remedy the defect of title thus produced, where the original document cannot be found, it is customary to procure an exemplification of the General Land Office record, and this, when recorded, practically takes the place of the original patent.

SECTION 16. DEEDS OF CONVEYANCE.

In the United States the ancient technical principles relating to common law conveyances seem to be in a great measure inapplicable. The tendency of modern legislation as well as the current of later decisions, has been to simplify the forms of conveyances and to reduce the number of methods. The deeds commonly in use, and by which the great bulk of real estate transactions between individuals is effected, are, the deed of bargain and sale, popularly known as "Warranty Deed," and the deed of release and quitclaim, known as "Quitclaim Deed." To these may be added a third, a deed adapted from the old deed of non-claim, combining qualities peculiar to each of the other two classes, and called "Special Warranty Deed." They are all effectual to convey the fee, or whatever interest the grantor may possess, and will always do so unless a contrary intention is expressly manifest or clearly deducible by implication.

In preparing an abridgment of an ordinary deed of bargain and sale, when drawn in the usual manner, and unincumbered by unusual conditions or stipula-

tions, only the salient features are necessary, it being understood that the deed is in form and that all the essential requisites have been complied with. Were this otherwise the abstract would become unnecessarily bulky and cumbersome, and defects, when shown, would be less readily detected. This is the universal custom of abstract makers, and the method seems to have met the approbation of the legal profession. Defects of form or substance, occurring in any part of the deed should be suitably noticed.

As in the case of simple warranty deeds, only the main features of quitclaim deeds need be shown in preparing a synopsis of same. Should the deed contain the statutory words which raise covenants, as is the case in some states, they then become material, for the instrument, in effect, becomes a warranty deed, though in form a quitclaim.³⁰

There is in common use in the United States, a deed of conveyance usually known as a "Special Warranty." The covenant, as generally framed, is a limited personal covenant, not as against paramount title, but only so far as concerns the acts of the grantor. It is a covenant of warranty to the extent of its import and differs from a general warranty only, in that one is a warranty against any and all paramount titles, while the other is against the acts of the grantor himself, and all persons claiming under him. The deed is shown in the abstract the same as a warranty deed except that it is called a "Special Warranty," and the express covenants are set forth. The legal effect of the deed is, of course, the same as a deed of bargain and sale in any other form.

In addition to the deed of bargain and sale, which

³⁰ De Wolf vs. Hayden, 34 Ill., 525.

in its three-fold form of "warranty," "quitclaim" and "non-claim," has been made a statutory conveyance in many of the States, there are a number of technical forms of conveyance derived from the land and conveyancing system of Great Britain and which are popularly known as "common law deeds." They consist primarily of the deeds of Release, Confirmation, Surrender and Assignment. In the United States they have lost considerable of their old redundancy while the differences in our land system, and estates thereunder, has robbed them of much of their former significance. There now exist but few estates that cannot be adequately conveyed by deed of bargain and sale, yet for some purposes they must still be resorted to. For the form and general legal effect of these conveyances the reader must consult the chapter on conveyancing. In all cases of the conveyance of special interests and qualified estates the material and operative parts of the instruments should be set forth. This will always be the case in conveyances of equitable interests, contingent and vested remainders, all conveyances not of present interests, as well as of incorporeal hereditaments such as easements, and the like. Great particularity is generally required in the treatment of these classes of conveyances, as their validity and effect do not depend so much on general principles, as in case of warranties and quitclaims, as upon the application of special provisions of law to particular facts. The operative words of conveyance, and frequently those of limitation, become material in determining the nature and extent of the estate granted, while the habendum, or some portion thereof, must also be resorted to for the purpose of explaining or further defining the grant made in the premises. The condi-

tions annexed to the grant, or restraint upon the use or enjoyment of the land must further be observed, and where covenants are inserted in a deed of this kind it is always well to exhibit them.

Conveyances subject to incumbrance require special care in abstracting, and all clauses relating to subsisting claims should be set forth fully. This is necessary from the fact that a purchaser is charged with notice of all recitals of this character, and is bound thereby, even though the incumbrance fails to appear of record. Though the conveyance of land subject to mortgage, unless expressly so provided, imposes no personal liability on the grantee, it yet raises a presumption that the purchaser buys the property to the extent stated and takes his chances of realizing out of it enough over and above the mortgage, to indemnify him for his advance of purchase money. The fair inference is that the purchaser does not pay the vendor the full value of the property, but that the amount of the mortgage debt is reserved in his hands as so much purchase money for the purpose of discharging the lien. In such case the land conveyed is as effectually charged with the amount of the mortgage as if the purchaser had expressly assumed its payment.

SECTION 17. CORPORATE CONVEYANCES.

There are three classes of corporations recognized by our laws: Public municipal corporations, corporations technically private but of a quasi public character, as railroads, etc., and corporations strictly private, all of whom, under general or special conditions have the power to acquire, hold and transmit the title to land. A corporation, however, has only such powers as its charter gives it, either expressly or as incident to

its existence. It would seem, therefore, that the organic act, or some portion thereof, should supplement every conveyance purporting to pass title to a corporation, but in practice this is seldom done. As corporations are now almost universally organized under general laws which define their powers in this respect the matter presents fewer intricacies than formerly. Whenever the charter of a corporation, or the general law under which it is organized, prohibits the purchase of land for any purpose, a deed to it would be an utter nullity. But if it has the power to purchase and take, though for a specific purpose only, it becomes fully invested with title by a deed properly executed and may transfer the same to a third party, notwithstanding the property was acquired and used for a purpose forbidden by the organic act.

As a general rule, deeds to and from corporations are effective to convey the land therein described, and titles so derived cannot be impeached collaterally, nor their validity be questioned by third persons, on the ground that the transaction was beyond the corporate power. In such a case the State alone may interfere.

Deeds by a municipal corporation stand upon a somewhat different footing from those of private corporations generally, and for their proper proof it is necessary that the authority for their execution should also appear.³¹ This authorization will usually take the form of a resolution of the municipal legislature. The resolution should always appear in the abstract in connection with the deed made pursuant thereto.

The legal title to the property held by incorporated religious societies is usually vested in trustees, and conveyances by such societies are effected through the

³¹ Ward vs. Lumber Co., 70 Wis., 445.

media of these trustees. More than ordinary care should be observed in abstracting such conveyances. The method of conveyance, if pointed out or prescribed by statute, is of the essence of the deed, and where the abstract does not disclose a full statutory compliance it should be sent back to the examiner for further investigation.

SECTION 18. CONVEYANCES BY DELEGATED AUTHORITY.

Every deed executed by virtue and in pursuance of a power should bear upon its face a recital of authority, but deeds purporting to be the direct act of the grantor though performed by an attorney in fact are sufficiently formal if the execution and authentication affirmatively show this fact. A conveyance made by an attorney must be in the name of the principal, and purport to be executed by him,³² and where the agent assumes either to grant or to execute, as where he signs and seals, although describing his office, the deed will be void as to the principal.³³ Neither will signing the principal's name, but making no mention of the attorney, be a valid execution.³⁴ It is not necessary however, that any particular form of words should be used to render the instrument valid and binding upon the principal, provided it shows upon its face that it was intended to be executed as the deed of the principal and that the seal affixed is his and not that of the attorney.

Immediately following the abstract of every deed purporting to have been made by the procurement of an

³² *Penonneau vs. Bleakley*, 14 Ill., 15; *Elwell vs. Shaw*, 16 Mass., 42; *Hale vs. Woods*, 10 N. H., 470.

³³ *Fowler vs. Shearer*, 7 Mass., 14;

State vs. Jennings, 10 Ark., 428; *McDonald vs. Bear River Co.*, 13 Cal., 235.

³⁴ *Wood vs. Goodridge*, 6 Cush (Mass.), 117.

attorney in fact, should appear the warrant or power which authorized the act. It is further important that sufficient evidence should always be furnished as to the continuance of the power at the time of its exercise. An unrevoked power duly recorded is sufficient as far as it goes, but unless the abstract also discloses the fact the principal was living at such time, and had not been subjected to any disability, prudence would suggest that an inquiry be made to ascertain such facts.

Trust deeds were formerly very common, but are now rarely employed, save in a few States where mortgages are made in that form. When conveyances in trust are allowed, the nature, quality and extent of the trust should be very explicitly stated, while in States where only a few enumerated express trusts are permitted, every part of the instrument necessary to bring it within one of the classes named in the statute must be shown. No particular form of words is required to create a trust, the intent only being regarded by courts of equity.

SECTION 19. OFFICIAL CONVEYANCES.

Official deeds comprise all those forms of conveyance wherein the maker acts by virtue of an office and not in his individual or personal capacity. They cover a wide portion of the field of conveyancing and assume a variety of shapes, but may be reduced to two general classes, viz.: those made in a fiduciary capacity, as the deeds of trustees, etc., and those made in a ministerial character, as the deeds of sheriffs, etc. The rules for construing deeds are much the same, whether the deed be made by a party in his own right, or by a fiduciary or officer or the court.

It is the policy of the law to invest the sheriff, master in chancery, administrator, or other officer making sales of real estate in a purely ministerial capacity, with only a mere naked power to sell such title as the debtor, deceased person, etc., had, without warranty or any terms other than those imposed by law. Hence, purchasers at such sales assume the risk of title, as well as the validity of the proceedings under which the sale is made.³⁵ Much detail will, therefore, be required in the abstract of an instrument of this character, which should show substantially all the material parts of the deed, including the recitals necessary to show a full compliance with the law, even though at times the instrument may seem to be unreasonably long.

To establish title to land under a sheriff's sale on execution all that is necessary to be shown, as a general rule, is a valid judgment, execution duly issued, and a sheriff's deed.³⁶ But in all cases the judgment is the foundation of the title, and proof of such judgment is indispensable to its validity. Where a deed alone is relied on it must show upon its face the officer's authority as well as all other essential requirements of a valid sale, but it may always be aided by the return on the execution, and where the judgment and execution are both shown omissions in the deed are generally immaterial, provided the deficiency is supplied by the writ and return.

Titles derived through trustee's deeds require close scrutiny, for where a deed of trust minutely and particularly prescribes the conditions under which, and the manner in which, the trustees shall have authority to sell the trust property, they have no power or authority to dispose of such property under any other

³⁵ Bishop vs. O'Connor, 69 Ill., 431.

³⁶ Riddle vs. Bush, 27 Tex., 675;

Hughes vs. Watt, 26 Ark., 228;

Lenox vs. Clark, 52 Mo., 115.

circumstances or in any other manner.³⁷ Those who deal with fiduciaries and trustees on the faith of the trust estate, must be aware that they exercise only limited and delegated powers, and are bound, at their peril, to take notice of such powers and see to it that the trustees confine themselves within their scope.³⁸

The lands of deceased persons are frequently conveyed through the media of what are known as "personal representatives," consisting of executors, or persons specifically designated for that purpose by the decedent, and administrators, who act by virtue of an appointment under the law. An executor may sell and convey lands held in special trust without the intervention of a court, but not such lands as are sold in due course of administration to pay decedent's debts, while an administrator can do no act affecting lands without the special order of a court. In case of sales by either officer no title passes until the execution and delivery of a deed.

Guardians and conservators frequently make conveyances of the real estate of their wards, either to pay debts or for the support and education of the ward, or for the purpose of investing the proceeds. Such conveyances, if attended by all the statutory requisites, are effectual to convey all the title which the ward may have possessed at the time of sale. Sales of this kind are made under the direction of the Probate Court upon petition by the guardian stating the jurisdictional facts, and after notice of such application, in the manner provided by law. Such sales must further be reported to and confirmed by the court granting the license, but the title of the ward will not be divested until a deed has been ordered and actually executed.

³⁷ Hunt vs. Townshend, 31 Md., 336.

³⁸ Owen vs. Reed, 27 Ark., 122;
Ventres vs. Cobb, 105 Ill., 33.

The deed should be preceded in the abstract by brief recitals of the antecedent steps or references to all jurisdictional facts.

SECTION 20. TESTAMENTARY CONVEYANCES.

Conveyances by way of will, or, as they usually are termed, testamentary conveyances, occur in every title of long standing, and give rise to more questions in construction than any other species of conveyance. As muniments of title wills should be of equal dignity with deeds, after proper probate and administration, but the subtleties which have been incorporated into the laws governing their construction have rendered them less so, except in cases of direct, absolute and unincumbered gifts.

One who takes under a will is regarded as a purchaser equally with him who takes under a deed, but the estate and title in the hands of a devisee, while as full and ample as though derived by deed, does not always possess that indefeasible character which attaches to it in the latter case. An innocent purchaser by deed takes the title unaffected by latent equities, and the undisclosed rights of third persons, but the devisee acquires only the title of the testator as it existed at the time of his death, with all its infirmities and imperfections, and subject to all equities and liens in favor of strangers. Such title is further liable to be defeated during the course of administration by sale made by the executor in satisfaction of the debts of the decedent; or by the very instrument of conveyance, when legacies thereby given are expressly charged upon the land and there exists a deficiency of personal assets.

An eminent English conveyancer once said, that he could scarcely admit of a will being abstracted at

all, and strongly recommended that it be copied instead, in order that counsel might have an opportunity of judging by the context as well as by the particular words of a devise or bequest. The reason assigned by the English conveyancer is a good one, yet, in preparing the abstract of a will it is not usually necessary that the entire instrument should appear, but only such parts as have special reference to the property in question. Modern wills, in many instances, and ancient wills uniformly contain a preamble dedicating the testator's soul to God, expressing the soundness of their minds, the health or debility of their bodies, and other particulars of no special importance, and which have no necessary connection with or relation to the subject of the examination, and may in all cases be safely omitted. The bequests and gifts of personalty are always omitted, except where a legacy constitutes a charge upon the land, in which case it, of course, becomes material. Devises of realty, other than the subject of the examination, may be advantageously omitted, but the residuary clause, though couched in general terms, should, as a rule, be inserted.

In an abstract the language employed by the will, aside from the strictly formal parts, should be closely if not literally followed, as well in respect to the property devised as the particular estate therein granted. The execution, if regular, may be passed without notice, as the proof of probate constitutes proof of the due and proper execution and publication of the will.

There are two methods of showing abstracts of wills: one, in case of record as a conveyance, as an independent circumstance, the same as other instruments of conveyance, and forming a separate link in the chain; the other, in connection with the proceedings had in

the Probate Court relative to the proof of the will and the administration of the estate. Either method may be adopted as will best serve the purpose, but it is believed the former method possesses advantages over the latter, and is that which should be adopted whenever the will has been recorded in the registry of deeds as provided by law. In the event of the first named method being used, the proof adduced before the Probate Court, or a summary thereof, should also be appended, such proof being required by statute to be recorded with the will. The proceedings relative to the settlement of the estate then follow as a separate showing. When the latter method is employed, a digest of the will should be inserted at the beginning of the synopsis of the proceedings. When conveyances have been made by devisees prior to probate or record, the chronological arrangement should follow the dates of execution, rather than of proof or record, except in the case of what are known as *post obit* conveyances.³⁹

Probate of a will has been defined as: the proof before an officer authorized by law, that an instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be.⁴⁰ It is the authentication of the instrument, and that which gives to it its legal effect and validity as a conveyance. A will, therefore, which has not been admitted to probate, though admissible perhaps in connection with proof of adverse possession, is not evidence of title in a court of law,⁴¹ nor would it afford constructive notice if recorded.

But, though probate establishes the sufficiency of

³⁹ Warvelle on Abstracts, 498.

⁴⁰ Pettit vs. Black, 13 Neb., 142.

⁴¹ Willamette, etc., Co., vs. Gordon,

6 Oreg., 175; Wood vs. Matthews, 53 Ala., 1; Pitts vs. Melser, 72 Ind., 469.

the will, and confirms the claims of those holding under it so far as to make it evidence of title, it does not determine the title to the property, nor establish the validity of any devise given by it, a will having no greater effect after probate than any other legal conveyance.

In order to enable a devisee of lands under a will, probated in a foreign jurisdiction, to deduce legal title to the same in the courts of the State where the land is located, it is frequently necessary that the will be also probated in the local courts. This matter is governed by statute, which generally provides that the copy of the will presented must be accompanied by a certificate of the foreign probate duly authenticated, these together constituting the one instrument or subject-matter to be acted upon under the statute; and all are, as a rule, essential to authorize the Probate Court to exercise jurisdiction. Whenever this ancillary probate is resorted to it is generally allowed as a matter of course, and without inquiring into the validity of the will or the sufficiency of the proofs upon which the Court granting the original probate acted, provided such original probate was granted by a court of competent jurisdiction and is properly authenticated.⁴²

SECTION 21. PROBATE PROCEEDINGS.

It is estimated that about once in every twenty-five years, all the real property in the country passes under the supervision of the probate courts, and whether the estimate be based on correct or incorrect data, it is certain that there are but few titles of twenty-five years duration that do not show testa-

⁴² Brock vs. Frank, 51 Ala., 89;
Apperson vs. Bolton, 29 Ark.,

418; Newman vs. Willetts, 52
Ill., 98.

mentary conveyances or descents. The records and proceedings of these courts, therefore, have a direct and important bearing on every title of long standing, and are among the muniments that go to give stability thereto, as well as security to the possession of the party asserting such title.

The ordinary proceedings of county and probate courts which have a direct influence upon land titles are: the probate of wills and issuance of letters testamentary and of administration; the inventory and collection of the effects of deceased persons; the proof of payment of debts and legacies; the assignment of dower and homesteads; the sale of lands by executors and administrators; the distribution and partition of the estates of deceased persons; and, incidentally, of proceedings relative to guardians and wards, adoption, etc.

SECTION 22. DESCENTS.

The best known but least understood title to land, is that which the law raises for the heir upon the death of the ancestor. It is called title by descent, and though for practical purposes is regarded as a new title springing from the death of the ancestor, and when asserted must be so proved, yet in reality it is but a continuation of the ancestor's title, which the law casts upon the heir at the moment of the ancestor's death. The heir is regarded in law as a legal appointee to receive the title, and this appointment he can neither disclaim nor avoid.⁴³ Whenever the death of any person is shown, until rebutted, the presumption is that he died intestate, that is, without having made a will, and that his heirs take his estate under the laws of descent.

⁴³ 2 Black, Com., 201; Warvelle, Real Prop., 144; Moore vs. Chandler, 59 Ill., 466.

Under the English system of abstracting, a descent is shown by a pedigree, supported by certificates of births, deaths and marriages, inserted in the order of their date. Family records, when shown to have been regularly compiled, are not without weight in the United States, and are frequently resorted to for proof of heirship in the administration of estates and trial of disputed land titles, but while they, with other evidence will be received by courts to prove pedigree and establish rights of succession, they do not constitute such evidence, save as they appear in court proceedings by way of recital, as is required in compiling an abstract, and examiners, as a rule, do not attempt to introduce them.

The usual method of showing a descent in the United States is by an abstract of the settlement of the decedent's estate. This should disclose the jurisdiction of the Court, appointment of administrator, proof of heirship and adjudication. This is sufficient to show the descent, but in order that the title of the heirs may not be obscured by latent defects or creditors' liens, the inventory, payment of claims, and final report and discharge of the administrator should also be shown.

It will frequently happen that the ancestor was a non-resident, and that administration was had upon his estate at the place of his late domicile. When such is the fact an exemplification of such proceedings should be procured and filed in the registry of deeds of the county where the land in question is situate. This will be sufficient to show descent, provided a finding of heirship appears, but in order to make an indefeasible title an ancillary administration should be had. The chief object of such ancillary administration is to bar

the claims of creditors, and if the property is valuable this step should always be taken.

It is competent for all the heirs to an estate, if of age, to settle and pay the debts of the estate and to make partition of the property among themselves, without any administration; and neither creditors nor debtors of the estate have a right to complain. Few titles, however, are to be accepted with greater caution than those asserted and purported to be conveyed by persons claiming to be the heirs at law of the person last seized, in the absence of full compliance with prescribed regulations concerning the descent and distribution of intestate estates. A title resting on no better foundation than a deed of this character, unless reinforced by the statute of limitations, is entitled to little consideration, and is liable to be defeated at any time before the bar of the statute has interposed. Nor can the purchaser know, unless personally cognizant of the facts, that all the heirs have united in the conveyance, or that they are qualified to convey; or that a widow's dower may not greatly depreciate the value of the property thus acquired. Sometimes, in a case of this kind, affidavits are resorted to to prove heirship, death of ancestor, etc., in which event they should be well authenticated as well as positive in their averments. But however well framed they may be they afford evidence of the lowest order only.

SECTION 23. LIENS, CHARGES AND INCUMBRANCES.

A lien is a hold or charge which one person has upon the property of another as a security for some debt or charge, and in its broad sense would cover all burdens, charges or incumbrances placed on land, including mortgages, judgments, taxes, etc., as well as

common law and statutory liens, and liens arising by implication of law. In its more restricted signification it is used to denote certain preferred or privileged claims given by statute or arising by implication of law, and indicates a mere right to hold the property until the claim has been satisfied. Even in this latter sense, as it is now employed in conveyancing and the compilation of abstracts, its popular meaning confines it to certain classes enumerated by statute; as the lien of mechanics and material men, attachment, etc., and to liens arising by operation of law, as decedent's debts, purchase money liens, etc.

Liens upon lands are created by the statute, to secure the payment of taxes, and other public debts; to protect estates raised out of or incident to the marriage relation; to effectuate the judgments of courts by allowing the land of the defendant to be taken in execution as well as to anticipate such judgments by way of attachment and *lis pendens*; to secure the payment of the debts of deceased persons, and to secure the wages of laborers and mechanics. They are also created by the direct act of the parties, as by leases, mortgages, etc., and arise in a number of cases by operation of law, as to secure unpaid purchase money, etc., these latter being known as equitable liens. Intending purchasers are chargeable with notice of all statutory liens, the provisions of the statute having been substantially complied with, but will take the land, where the sale is made in good faith and for value, freed from the burden of equitable liens of which they had no notice.

In the preparation of abstracts of title, liens, charges and incumbrances of every kind, with but one exception, are shown, not in the regular course of title, but in appendices to same, and, for better convenience,

under classified heads. The exception is in the case of mortgages, which, following the custom which prevailed when such instruments were regarded as conveyances of the legal estate, are shown in regular chronological order in the chain.

SECTION 24. LIS PENDENS.

A pending suit involving title conveys notice to intending purchasers, and charges the land, in whose-soever hands it may be, with the consequences of whatever decree may be made. This is known technically, as *lis pendens*. The doctrine of *lis pendens* is, that a purchase of property actually in litigation, or, as the technical phrase runs, a purchase *pendente lite*, although for a valuable consideration and without any actual notice, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree rendered in the suit.

The doctrine of *lis pendens* applies only where a third person attempts to intrude into a controversy by acquiring an interest in the subject-matter of the litigation. The reason of the rule is, that if a transfer of interest pending suit were to be allowed to affect the proceedings, there would be no end to litigation; for as soon as a new party was brought in he might transfer to another, and render it necessary to bring that other before the Court, so that a suit might be interminable.

It will be understood, however, that the rule, that a party purchasing *pendente lite* is to be regarded as a purchaser with notice, subject to all the equities of the person under whom he claims, and bound by the decree that may be rendered against the person from whom he derives title, applies only to cases in which

such purchaser derives title from one of the parties litigant. If he claims adversely to both parties by title paramount, the proceedings to which he is neither party nor privy can not bind him.

The common law rule requiring purchasers, at their peril, to take notice of the pendency of suits in courts of justice for the recovery of the lands they are about to purchase, although it is really impossible that they should actually know that such suits have been commenced, has always been considered a hard rule, and is by no means a favorite with the courts. In fact, it has only been tolerated from a supposed necessity. Usually the filing of a bill of complaint is itself a sufficient notice to the world, so as to defeat the transfer of property by the defendant made subsequent to the filing;⁴⁴ but in a large number of states, particularly where the provisions of the New York Code have been followed, a material change has been made this rigorous rule. In these states the statute provides that the pendency of a suit shall not be notice to a stranger until a formal notice thereof has been filed in the office of the recorder of deeds of the county where the land is situated, and that as to one having no actual notice, he may, in good faith, and for a valuable consideration, acquire a valid title until such notice is filed.

Where the suit is still pending the notice may be shown as an appendix. If the proceedings are shown, as they should be after the bill has been filed, its orderly arrangement would be to precede the synopsis of the court proceedings. Where no notice is required the bill itself furnishes notice as above explained. The

⁴⁴ Warvelle on Abstracts, 523; Van Zant vs. Van Zant, 23 Ill., 536;

Davis vs. Life Ins. Co., 84 Ill., 508.

practical purpose of a notice of pendency of suit is to restrain strangers from acquiring interests in the subject-matter of the litigation during the progress of the suit.

SECTION 25. ATTACHMENT.

The office of an attachment is simply to secure to a creditor the property which a debtor has at the time the writ is levied, so that it may be seized and sold in satisfaction of the debt, after judgment and execution shall have been obtained. In other words, it reserves the land to satisfy any judgment that may be rendered in the suit and creates a lien in favor of such judgment in advance of its rendition. Every person into whose hands the property may subsequently come, takes it charged with this lien.

Though the remedy by attachment is purely statutory, and while there exists in many particulars a wide dissimilarity between the attachment acts of the several states, there is yet a marked uniformity in the general steps that must be pursued to render it available, and its effect in all the states is nearly identical. The suit is instituted by the filing of a statutory affidavit, whereupon a writ is issued. This is followed by a levy, which, in the case of land, must, of necessity, be a paper levy. The levy is initiated by the endorsement of the fact upon the writ, and perfected by the return thereof, while notice is afforded by the filing of a certificate of levy with the recorder of deeds. Until such certificate has been filed the attachment does not become effective as to third persons.

In preparing an abstract the certificate of levy would probably be all that is required to furnish a notice *lis pendens*, but in practice it is customary to show a brief synopsis of the court proceedings. Neither

in this, nor in other cases where court proceedings are shown, is it customary to give more than brief references, or statements of steps taken, and where greater detail is desired it is obtained by a transcript of the record and papers, or by a personal inspection of the files. Where the action is duly prosecuted and is followed by judgment, execution and sale, the attachment may be indicated only by reference to the issue, levy and return of the writ and filing of certificate, the validity of the sale depending on the judgment and execution.

SECTION 26. JUDGMENTS AND DECREES.

Any distinction between judgments and decrees is fanciful rather than real, since all adjudications by a court of competent jurisdiction are essentially judgments, yet in practice the term "decree" is used to distinguish the determinations and orders of a court of equity, while the term "judgment" is generally employed to denote the adjudications of a law tribunal. Judgments are usually for damages, and provide for a definite recovery in money; decrees contemplate some method of affirmative relief or operate in some specific way in answer to the prayer of the complaint.

In examinations of title, judgments *in personam* are important only as they serve to incumber the land of the judgment debtor with a statutory lien, and when the lien has been extinguished, either by lapse of time or satisfaction of the judgment, they become of no importance whatever and are wholly disregarded. Decrees, on the other hand, operating directly upon the land, are of controlling and continuing efficacy. They become a part of the general course of title, and through

whatever mutations it may afterward pass they always remain essential links of the chain.⁴⁵

Where the abstract shows a judgment duly rendered against any of the parties in interest from which an appeal has been taken, notwithstanding that a bond has been given, such judgment must yet be noted as defect of title. The appeal does not vacate the judgment nor destroy its lien. Its only effect is to operate as a stay of proceedings for enforcement during the pendency of the appeal,⁴⁶ and in case the judgment is affirmed it has practically the same force and effect as though no appeal had been taken.⁴⁷

The lien of a judgment rendered by a State court attaches only to the land of the debtor situate within the county for which the court is held, or in which a transcript has been regularly docketed, and a certificate covering only the county courts of record is all that is necessary to fully apprise intending purchasers of the condition of the title so far as the same may be affected by the adjudications of the State courts. At the present time the territorial lien of a judgment of a Federal court is only co-extensive with the limits of the county in which it is rendered. This, however, is a construction of the statute by the courts and not a direct enactment. Formerly a Federal court judgment was effective throughout the district in which the court sat.

A judgment, whether of State or Federal courts, is not a specific lien upon any particular land of the judgment debtor, but extends generally upon all of his proprietary holdings, subject, however, to prior liens, legal or equitable.

⁴⁵ Warvelle on Abstracts, 530.

⁴⁶ Oakes vs. Williams, 107 Ill., 154.

⁴⁷ Walker vs. Doane, 108 Ill., 236.

The lien of judgments upon real estate is regulated by statute, and the general rule is, that the lien continues for ten years⁴⁸ from the rendition of the judgment, and no longer, except that in a few enumerated cases where a party is restrained from enforcing his judgment by appeal, injunction, etc., the time so consumed is excluded from the computation. A purchaser from a judgment defendant after the expiration of ten years from the rendition of the judgment, or such other period of limitation as the statute may prescribe, takes the land discharged from the lien of same, unless it has been preserved by some of the exceptions contained in the statute.⁴⁹ Ordinarily a search for judgments covering a period of ten years is sufficient, and it is not customary for the examiner to certify judgments for a longer time. Unless specially excepted, neither injunction, appeal nor other cause will have the effect to prolong the lien beyond the statutory period, as against a purchaser from the judgment debtor.⁵⁰

No set form of words is necessary to be employed in rendering judgments, provided they are certain and find the sum for which they are rendered, but failing in this they are fatally defective.⁵¹ The certainty required has reference both to the parties and the recovery, for the judgment is regarded as a unit and must comprehend all the parties then before the court, while the recovery must be certain and specific in the amount with nothing left to implication. Other-

⁴⁸ In some states for a shorter period. Thus, in Illinois for only seven years. In most states, however, the term is fixed at ten years, as stated in the text.

⁴⁹ *Applegate vs. Edwards*, 45 Ind.,

329; *Gridley vs. Watson*, 53 Ill., 186.

⁵⁰ *Tucker vs. Shade*, 25 Ohio St., 355; *Houston vs. Houston*, 67 Ind., 276.

⁵¹ *Railway Co. vs. Chicago*, 53 Ill., 80; *Carpenter vs. Sherby*, 71 Ill., 427.

wise, to constitute a judgment record valid upon its face so that it may be enforced by action, nothing more need appear by it than that the court had jurisdiction of the subject-matter of the action and of the parties, and that a judgment was in fact rendered.⁵² In the abstract it is the general practice to give the name of the forum, together with case number or some other index for the purpose of reference; the full title of the case, and a statement of the fact of judgment, together with the amount for which it was rendered. A synopsis of the judgment is rarely given, nor is it at all necessary.

Unlike judgments *in personam*, which are ordinarily shown only by a brief reference, decrees and judgments *in rem*, or which affect or implicate title, are copied almost verbatim, or at least, are set forth with little condensation. Where a decree directly affects land, as in case of foreclosure or other action *in rem*, it is of vital importance that the description of the property involved be accurate and certain. The rules of conveyancing, which permit reference to extrinsic facts to aid the intention of the parties, have no application to descriptions found in judicial decrees, or deeds of conveyance founded upon them, nor can the assistance of equity be invoked to reform such descriptions.⁵³ Hence, if the decree and resulting deed are so defective that it cannot be ascertained by inspection, or from data which they furnish, what property was in fact sold, or, if in order to ascertain the intention of the officer selling it becomes necessary to institute an extraneous inquiry, the proceeding will be void for uncertainty.⁵⁴ From what has been said it will be per-

⁵² Maxwell vs. Stewart, 22 Wall., 77.

⁵³ Lewis vs. Owen, 64 Ind., 446.

⁵⁴ Evans vs. Ashley, 8 Me., 177;
Bowen vs. Wickersham, 124
Ind., 404.

ceived that an abstract of a decree can consist of little else than a copy thereof.

Orders of sale made by Probate Courts are a class of decrees that call for severe scrutiny, as these orders are essential parts of the title. It has been held that an order of court for the sale of land must, in itself, be sufficient without reference to extrinsic matters, and where the description is insufficient, the sale will be invalid.⁵⁵

SECTION 27. JUDICIAL AND EXECUTION SALES.

No inconsiderable portion of the real estate of the country changes hands every year through the media of execution and judicial sales, meaning by such terms, all sales and transfers of property made in pursuance of the orders, judgments and decrees of courts, or sales made to obtain satisfaction of such orders, judgments and decrees. The term "judicial sale" is properly applied only to sales made in conformity to an order or decree directing same, and requiring a subsequent approval by the court. "Execution sales," though based upon a judgment, are made under the statute, for the recovery of a specific sum of money in satisfaction of the judgment. Sales made under an execution must conform in all respects with the rules which the law lays down for the protection of the debtor. If not so made they may be held irregular and void. But sales made under the decree of a court are, to a considerable extent, under the discretionary control of the Court, which often sets them aside, although no error or irregularity has been committed, merely for the sake of an advance in price; or which may, if satisfied that no injustice has been done, disregard irregularities in

⁵⁵ *Crosby vs. Dowd*, 61 Cal., 557; *Hill vs. Wall*, 66 Cal., 130.

the conduct of the sale, and confirm the action of the officer making same.

Statutory proceedings to divest title to land must be strictly pursued, and a substantial departure from the requirements of the statute will render the proceedings void. As a rule, however, the sheriff is presumed to have done his duty in making a sale, and to have complied with all the requirements of law. But this rule does not apply where the fact that the sale was in violation of the statute is apparent on the face of the record through which title is claimed. Great strictness is always required in conducting the sale, the details of which are regulated by express statutory provisions, and non-compliance with these provisions, as by offering the land in gross instead of in parcels, etc., will be sufficient to vitiate the proceeding, and the sale may be set aside, even as against a stranger who has bought the property and paid the price.⁵⁶

The doctrine of *caveat emptor* applies to every purchaser at a sheriff's sale. He buys at his peril, and succeeds only to the right and title which the defendant in execution had at the time the judgment was rendered against him. The selling officer has no power to warrant the title and the purchaser is presumed to have made all proper examinations and to know what he is acquiring.⁵⁷ The judgment is, of course, the foundation of the title, and the purchaser must see to it that at the time of sale such judgment is subsisting and unsatisfied, for, however innocent he may be, he can acquire no title when the power which confers the same has ceased to exist.⁵⁸

⁵⁶ Vass vs. Johnson, 41 Ind., 19;
Browne vs. Ferrea, 51 Cal.,
552; Morris vs. Robey, 73 Ill.,
462.

⁵⁷ Atwood vs. Wright, 29 Ala., 346;
Bassett vs. Lockard, 60 Ill.,
164.

⁵⁸ King vs. Goodwin, 16 Mass., 63.

While it is a cardinal rule that the execution must conform substantially to the judgment, or the sale will be void, yet it is not customary to more than allude to this instrument in the abstract of an execution sale, unless special instructions are given otherwise. Nor will an extended notice in most cases be necessary, as the purport and effect of the writ are generally recited in other of the proceedings under it.

A levy of lands is made by an indorsement thereof upon the writ, there being no such thing as seizure of the property. The sheriff, when levying on real estate, does not disturb the possession of the debtor, nor even his right of possession, and this constitutes the chief distinction between a levy on real estate and on personal property. In an abstract of the sale it is regarded as a minor detail, which may be briefly noticed in the return of the execution, but the certificate and deed supply in better shape the necessary information concerning it.

A sale of land under a decree must be made in the manner and on the terms prescribed in such decree, and a confirmation by the Court of the report of the officer will not cure the invalidity of a sale not so made. But a sale will not be disturbed unless the party suing can show an injury resulting to him therefrom, while it is always the policy of the law to uphold judicial sales, and to protect the rights of purchasers under them. Although a decree may be afterward reversed, yet all rights acquired at a sale while the decree was in force, and which it authorized will be protected.

The title acquired under a sale by order of the court differs in no material respect from that obtained where the sheriff is the vendor. The purchaser is entitled to the interest of all the parties to the suit, and to the

interest of any person who may have purchased during the pendency of the suit from any of the parties. But he acquires no new rights nor does the fact that the court is regarded as the vendor confer upon him any superior equities. A court does not insure the title to real property sold under its decrees, and the purchaser buys, presumably, with full knowledge of all defects and pre-existent liens.⁵⁹ He is charged with notice of all facts disclosed by the record and he is bound to examine the title or purchase at his peril. If he buys without examination and obtains no title, he must, as a general rule, suffer the loss arising from his negligence, unless fraud or mistake has entered into the transaction. Prior to confirmation he has no independent rights, but is regarded as a mere proposer; after confirmation his rights become vested, and the sale will not be set aside except for fraud, mistake, surprise or other cause for which equity would give relief if the sale had been made by the parties in interest instead of by the court.

A purchaser at judicial sale has a right to presume that it is conducted according to the provisions of law, and proceedings in court, in a matter over which it has jurisdiction, will be presumed to be regular. Hence, a purchaser, at a sale made by order of such court, is not bound to look further back than the judgment or decree, and the legal effect it may have on the title which is the subject of inquiry.

After the sale, and before the execution of a deed, a report of sale must be made to the court which ordered same, and if upon examination the court approves the report it confirms the action of the officer who made the sale. Until this has been done the sale is incomplete

⁵⁹ *Gynn vs. McCauley*, 32 Ark., 97;
Capehart vs. Dowery, 10 W. Va., 130.

and confers no rights on the purchaser. In judicial sales a confirmation is rendered necessary from the fact that the court, and not the officer making the sale, is regarded as the vendor, and confirmation constitutes the final consent. Where an abstract of judicial proceedings culminating in a sale and conveyance is shown, the order of confirmation is material, and, if wanting, the apparent defect should be made the subject of proper inquiry.

Deeds do not issue immediately upon execution sales, and in most cases, judicial sales as well, but a reasonable time is allowed during which the judgment debtor may redeem the property upon payment of the judgment, costs, etc., and a certificate stating the facts is issued to the purchaser at the time of sale. A duplicate of this certificate is recorded by the selling officer in the registry of deeds, and the certificate, duplicate, or the record thereof, is by law made evidence of the facts therein stated. In case of redemption a certificate of redemption is issued and recorded in the same manner.

The certificate of sale confers on the holder no title or interest in the land, especially where the time for redemption has not expired, and the possession of the defendant in execution cannot be disturbed until his title has been transferred by the officer's deed. After the execution of deed the certificate ceases to be an essential muniment of title.

SECTION 28. ACTIONS AND PROCEEDINGS.

In the compilation of abstracts it is frequently necessary to show certain classes of actions in the courts that operate directly upon the title to land and culminate in what are known as judgments *in rem*.

The actions and proceedings that call for special notice on the part of a person examining title, are such as relate to the recovery of specific real property, or the possession thereof, called ejectment; actions and proceedings for partition; foreclosure of liens and mortgages; bills to quiet title; actions brought to enforce the specific performance of land contracts; proceedings under the right of eminent domain; suits for dower; and incidentally such bills, actions or proceedings as from their nature may operate as *lis pendens*. All the proceedings specially enumerated should be stated in the abstract with a reasonable degree of detail. The decree entered in these matters, when followed by deed, is the foundation for such deed, and of equal dignity with it, while the anterior proceedings go to establish the validity of the decree. In addition to those matters of exclusive cognizance in the circuit court, the examiner should also show all proceedings in the county (probate) court that incidentally affect title by reason of the relation of the parties to the subject-matter. In this way proceedings relative to adoption, guardianship, etc., will frequently appear as well as assignments of dower and homestead.

The validity of all decrees, as well as sales and conveyances that may result therefrom, depends upon the jurisdiction of the court, and this has reference both to the parties and to the subject-matter.⁶⁰ Both of these particulars must satisfactorily appear in the abstract, and are shown, in the one case by the return of the summons, the method of service being given where greater certainty is desired, and in the other by a synopsis of the bill and other pleadings. Where it appears from the whole record that the court had

⁶⁰ Campbell vs. McCahan, 41 Ill., 45.

no jurisdiction over the person or subject-matter the judgment or decree is void. On the other hand, if the court had cognizance of the matter as it appears from the pleadings, and had the parties before it, then the judgment or decree which is authorized by the pleadings is valid until set aside or reversed on appeal.

The reason why these matters are shown in abstracts of title is because of the rule in equity that purchasers are directly affected by every matter or circumstance concerning the title to the property they take, which affirmatively appears from the pleadings or decrees of courts of competent jurisdiction, in actions relating to such property, whether such purchasers have actual notice or not.⁶¹ It is the application of this doctrine which renders necessary a searching investigation of the court rolls whenever real property is sold, for every man is presumed to be cognizant of what transpires in the courts of justice, and the law will charge him with actual notice of whatever there occurs, which affects the merits of the title he would take.⁶²

In preparing minutes of equitable actions involving title much nice discrimination is necessary in order that the abstract may show a perfect resume of the proceedings and of all the material points presented, and yet not become unwieldly. The name of the court in which the action is prosecuted; the title of the cause; case number, and date of commencement of the action come first, and in the order indicated. Then follows a brief statement of the material parts of the bill, with all repetitions and surplusage eliminated. The subse-

⁶¹ Leitch vs. Wells, 48 N. Y., 585;
Jackson vs. Warren, 32 Ill.,
331; Blanchard vs. Ware, 37
Iowa, 305.

⁶² Fissler's Appeal, 75 Pa. St., 483;
Loomis vs. Riley, 24 Ill., 307.

quent steps next follow in chronological sequence down to the final determination or decree, which is usually shown in full.

Of the various actions and proceedings to be noticed, but little can be said within the narrow confines of this article. A few of the most important will be briefly noticed:

Injunctions are rarely shown in abstracts of title, and when shown have reference usually to transitory matters which affect title only incidentally, being connected rather with the use and occupation of the land, than with any matter that goes to the title. Perpetual injunctions, when relating to matters which directly concern title, become permanent muniments, and, of course, must be regularly shown in connection with the enjoined matter. This will be the case in respect to rights of way appurtenant to land; of deeds declared to be void, when attempted to be used as evidence of title; and of judgments which have become invalidated from any reason. A perpetual injunction to quiet title will sometimes lie when there has been no trial at law, as when the party having possession has been disturbed but not so dispossessed as to make it the subject of an action at law.

Ejectment is an action to recover the possession of land and incidentally to determine the title. It can be brought only by a person out of possession against the person in possession of the premises, if they are occupied, or against one claiming title if they are vacant or unoccupied. It is used not only to determine title of parties claiming from the same source, but also to settle conflicting adverse titles derived from independent sources. Inasmuch as the judgment is conclusive on the rights of the parties to

the subject-matter of the action and all persons claiming by, through or under them, by title accruing after the commencement of the action, the abstract should fully show the points presented, their relation to the land, and the final disposition, which may all be easily accomplished by a full synopsis of the pleadings, the verdict, and the judgment rendered thereon.

Partitions occur in many titles of long standing, particularly in agricultural lands and large tracts, and as the interests of minor heirs and others under disability are frequently involved, the proceedings should show affirmatively a full statutory compliance. The procedure is substantially the same in all the states, making due allowances for minor differences of practice, and involves the presentation of the case to a court of competent jurisdiction; a decree defining the interests of the parties; the appointment of a master or commissioners to execute the decree and make partition, or to inquire into the expediency of same or susceptibility of the property to partition; the report of the commissioners, and confirmation or final decree. All of the foregoing steps are essential, and form regular links in the chain of title.

Equity will enforce specific performance of agreements relating to lands. They assume a large variety of forms, but the action occurs most frequently in attempts to enforce conveyance of lands purchased or agreed to be sold. In such cases, where performance has been decreed and consummated, a rather full synopsis should be given of all the material parts of the pleadings; master's report, if there has been a reference; and of the final decree. If performance has been denied, and the contract or agreement is of record, a brief notice of same and the action had thereon may be shown as an appendix.

Probably no class of legal proceedings so often figures in examinations of title as actions brought to foreclose and enforce liens, and particularly is this true in the matter of the foreclosure of mortgages. Two general methods of foreclosure are recognized in equity, one, called strict foreclosure, whereby the mortgagee is adjudged the absolute owner of the property; and the other, by a sale of the property under the direction of the court and by one of its own officers, in which case the proceeds are applied to the discharge of the incumbrances, according to their priority, and the balance, if any, is paid over to the mortgagor. Strict foreclosure has always been regarded as a harsh remedy, and is not now permitted in most of the states, nor is the title thus acquired as safe as when made by the ordinary foreclosure by sale.

The title derived under a foreclosed mortgage is evidenced by the mortgage itself; the proceedings and decree in the foreclosure suit; the certificate of sale; report, and confirmation; and, finally, by the selling officer's deed, all together composing one transaction. Much care should be exercised in preparing a synopsis of the proceedings and the examiner should see that all persons who might otherwise legally assert any rights in relation to the mortgaged premises have been regularly brought in and properly barred or their rights adjusted. This will include not only the mortgagors, but subsequent mortgagees, judgment creditors, lien holders, and all other persons possessing legal rights or equities accruing subsequent to the lien asserted by the mortgage.⁶³

Divorce proceedings are seldom shown in abstracts of title, save as they may incumber land by the lien

⁶³ Hinson vs. Adrian, 86 N. C., 61; Maybury vs. Ruiz, 58 Cal., 11.

for alimony, and then only in brief and general terms. A divorce has another important effect on titles, however, considered in respect to dower. The general rule is that the dissolution of the marriage relation restores the parties to the same relative positions they occupied prior to entering into same. One of the incidents, therefore, is the loss of the dower right of the wife, and to show a full and complete devolution of title an appropriate mention of divorce seems necessary in all cases where the question of dower would properly arise.⁶⁴

In the examination of titles questions growing out of the exercise of the right of eminent domain are often presented where there has been an abandonment of the lands appropriated, or a diversion from the original purpose. Condemnations are also shown incidentally, as where rights of way are acquired over tracts which form the subject of the examination. It will frequently be advisable to show condemnation proceedings where land is taken for the opening or widening of streets, and the result is a change in the shape or dimensions of platted lands.

SECTION 29. TAXES AND TAX TITLES.

Taxes are burdens or charges imposed by the legislative power, upon persons or property, to raise money for public purposes or to accomplish some governmental end. The lien for taxes attaches to all land subject to taxation annually, upon some day stated, the time being different in nearly every State, and continues until the tax is paid.

* *Burdick vs. Briggs*, 11 Wis., 126;
Given vs. Marr, 27 Me., 212
In some states dower is preserved where the decree is ren-

dered in favor of the wife for the misconduct of the husband. Consult local statutes.

Many examiners make no search for information concerning current taxes, yet this is one of the things of which intending purchasers should be apprised. Taxes are due and payable at a stated time each year and when the date of the search is after this time, and before the time fixed for the sale of lands for delinquent taxes, an examination should be made to ascertain the fact of payment or non-payment.

Usually the payment of a tax is enforced by a sale of the land upon which it has been imposed. The methods employed are too various to attempt special mention. Whatever may be the methods employed the proceedings are summary in their nature and the requirements of law must be strictly pursued or the whole transaction will be void. When special proceedings are authorized by statute, by which the estate of one man may be divested and transferred to another, the owner has a right to insist upon a strict performance of all the material requirements of the statute, especially those designed for his security, and the non-observance of which may operate to his prejudice. It is not the policy of the law to deprive the citizen of his property by sales made on account of the government through its officers, who have no personal interest in the matter, without putting him wholly in fault in not complying with his obligations.

A synopsis of the special proceedings culminating in the sale is of the highest importance whenever the sale is relied upon as the foundation of title, but in ordinary examinations tax sales are shown rather in the nature of incumbrances on the title or charges upon the land, and it is customary to show only the fact, leaving the question of validity to be decided by other and special searches. For this reason tax sales,

when still subject to redemption or not consummated by deed, are shown after the chain and under a classified head, the abstract consisting only of a brief mention of the date of sale and tax for which same is made, with reference to the official record. Then follows a brief description of the lands sold and the name of the person to whom the certificate issued. Forfeitures to the State are treated the same as tax sales.

From two to three years is the period ordinarily allowed in which the owner or interested party may discharge the obligation imposed by the levy of the tax and relieve the land from its burden. During this period the purchaser has a contingent interest, which, after the day for redemption has passed, may ripen into an absolute title. This contingency may be defeated by payment, and, when such is the case, it often becomes a matter for special mention. It is not the usual custom of examiners, however, to make special mention of a redemption, as the certificate of the abstract is presumed to be a sufficient statement of the condition of the title at its date. Many examiners show redemptions by a marginal note on the original abstract of the tax sale, and this, in most instances, is considered the preferable way. Neither the legal nor the equitable title to lands sold for non-payment of taxes vests in the purchaser until the execution and delivery of a tax deed. This deed does not operate *ipso facto* to transfer the title of the owner, as in ordinary deeds between individuals, but is the last act of a series of proceedings upon the regularity of which it depends for its character and effect. In a majority of the states, however, such a deed, when formal and duly executed, is taken as presumptive evidence of the regularity of all antecedent proceedings from the

listing or valuation of the land up to the issuance of the deed. But the owner of property cannot be precluded from showing the invalidity of a tax deed thereto by proving the omission of any act essential to the due assessment of the same, the levy of a tax thereon, and the sale thereof on that account. As to the performance of these acts, and the facts necessary to constitute them, the deed can only be made *prima facie* evidence.⁶⁵ Whenever it is shown that any essential particular in the prior proceedings has been irregular its *prima facie* character is lost, and the person asserting title under it must prove its regularity and the due observance of all of the statutory requirements necessary to give it validity.⁶⁶

In addition to the ordinary charges annually imposed by the State, and which are usually designated as taxes, the examiner must also search for what are generally termed "assessments." An assessment, as distinguished from other forms of taxation, means a special or local imposition on property in the immediate vicinity of municipal improvements which is necessary to pay for such improvements, and is laid with reference to the special benefit which the property is supposed to have derived therefrom. A properly prepared abstract should show all confirmed special assessments against the property under investigation which remain unpaid at the date of the certificate. The statement may be brief but should comprise such data as will fully acquaint intending purchasers with all necessary particulars and readily enable any person interested to refer to the original sources of informa-

⁶⁵ Allen vs. Armstrong, 16 Iowa, 508; MacCready vs. Sexton, 29 Iowa, 356; Steeple vs. Dowling, 65 Ind., 501.

⁶⁶ Sibley vs. Smith, 2 Mich., 486; Turney vs. Yeoman, 16 Ohio, 24; Thompson vs. Ware, 43 Iowa, 455.

tion. Assessments are shown as appendices in connection with statements of unpaid taxes and tax sales. Sometimes the entire sum of an assessment is divided into fractional parts and the payment extended over a series of years. When such is the case, the fact should be noticed and the installments paid and unpaid should find appropriate mention.

SECTION 30. ADVERSE TITLES.

In examinations of title it is not uncommon to find two, or even more, conflicting claims of title evidenced by deeds or other matter of record, while inquiries *in pais* may further disclose claims of title and ownership founded upon actual occupation and possession, under claims of right resting upon unrecorded deeds, undisclosed descents, or prescriptive user. In some cases the adverse titles have a common origin, and all flow from the same source; in others they originate through tax sales, or by reason of independent conveyances from individuals. Sometimes the adverse titles are only seeming, being the results of mistakes in the drafting of conveyances. The questions raised by these conflicting claims are numerous and sometimes very difficult of solution.

Under a separate head of "Adverse Conveyances" are usually grouped all conveyances emanating from independent sources and not connected with the original grantor or forming a part of the regular course of title. These conveyances may consist of tax deeds and resulting conveyances which have not been merged into the common ownership; an assertion of title by one having no record evidence; and deeds which by erroneous descriptions do not convey the property intended, but cover other and different parcels. Where

an adverse title appears of record, followed by mesne conveyances, and eventually merging into the original title, the deeds constitute a part of the chain and are shown in the regular course.

An adverse title need not depend on documentary evidence, but may rest wholly on occupation coupled with other circumstances. This, of course, the abstract will not show, and the facts which constitute such title are ascertained by inquiries *in pais*.

It is a general rule, that where one enters upon land under a recorded deed, his entry and claim must be referred to that deed and measured by it.⁶⁷ Such deed, although void in fact, yet gives a "colorable title" to the purchaser, and where it professes to convey the entire estate, a claim and occupation under it creates an adverse possession as against all the world.⁶⁸ Possession under a claim of title, without a deed or other written instrument, limits the person so asserting his claim to his actual enclosure or occupancy,⁶⁹ but when founded on a claim and color of title, a constructive possession of the entire tract will follow the actual occupancy of any portion,⁷⁰ provided the deed or other matter be of record.

A valid title is not required in order to enable a party to rely upon adverse possession under the statute of limitations, nor is it necessary that he should trace title through a chain to any source.⁷¹ A deed which purports to convey a complete title will be sufficient to give color of title, and, generally, when followed by a continuous and uninterrupted possession for the

⁶⁷ Stevens vs. Brooks, 24 Wis., 326.

⁶⁸ Edgerton vs. Bird, 6 Wis., 527;
Brooks vs. Bruyn, 35 Ill., 394;
Hamilton vs. Boggess, 63 Mo.,
233.

⁶⁹ Dills vs. Hubbard, 21 Ill., 328.

⁷⁰ Scott vs. Elkins, 83 N. C., 424;
Coleman vs. Billings, 90 Ill.,
577; Webb vs. Richardson, 42
Vt., 465.

⁷¹ Rawson vs. Fox, 55 Ill., 200.

entire statutory period, it will constitute an adverse holding, effective for all purposes, however groundless the supposed title may be.⁷²

An actual continued occupation of lands under a claim of title exclusive of any other right, although not founded on a written instrument, is yet sufficient, if extending through the entire statutory period, to confer title to the part so actually occupied.⁷³ It is immaterial to support title thus claimed whether there be a deed valid in form, or whether there be no deed, but there must be a claim of title, and there must be an actual occupation measured by a distinct, visible and marked possession. Permissive user can never, by any lapse of time, and even though continuous and exclusive, ripen into a title to the fee. Hence it is that mere "squatters," or intruders upon lands, acquire no rights by reason of their possession, for the gist of every adverse holding, as above explained, is, that it is accompanied by a claim of right, and a mere trespass can never resolve itself into a right, so as to set the statute in motion, however long continued.

When the title offered is adverse in its character, special efforts should be made by inquiries *in pais* to demonstrate its validity before accepting same. The highest and best record proof that could be adduced would be the judgment of some court of competent jurisdiction, either in an action of ejectment or a suit to quiet title. A deed purporting to convey title is next in order, while the payment of taxes and the like still further tend to strengthen it. Many of the facts which go to confirm an adverse title are not capable, however, of affirmative showing in an abstract, and

⁷² Ford vs. Wilson, 35 Miss., 504;
Grant vs. Fowler, 39 N. H.,
104.

⁷³ Dills vs. Hubbard, 21 Ill., 328;
Doe vs. Eslava, 11 Ala., 102.

evidence concerning them must, of necessity, be disclosed *aliunde*.

SECTION 31. INSOLVENCY AND BANKRUPTCY.

Title is frequently affected by proceedings in insolvency and bankruptcy. Where the action is had in the State courts the proceeding is usually denominated insolvency, and the effective means whereby title is transferred is by an "assignment." Though voluntary assignments are founded in common right, yet, to prevent fraud they must be attended by the prescribed legal formalities of the State where made, or where the property to be affected is situated. Unless executed in conformity with such laws they are inoperative and void. The assignment should be executed with the same solemnities that characterize ordinary deeds, and defects of form and substance should be noted by the examiner with the same care as in other conveyances between individuals.

No particular form of instrument is needed to constitute an assignment, and any valid transfer, intelligibly indicating the trusts, will suffice. The statutory requirements relate mainly to the acceptance of the trust by the assignee, filing of bond, notice to creditors, etc., and in these respects a literal compliance is usually necessary. The abstract should show a full synopsis of the proceedings; the operative parts of the instrument of transfer, including the trusts, and such portions of the inventory or schedule as cover the real estate in question.

At the date of this writing, a national bankrupt law, passed in 1898, is in force, under which many transfers have been made. Numerous transfers under the operation of past laws will also be found. Pro-

ceedings by virtue of the law of 1841 require but slight notice, the rights of all parties thereunder having become permanently established by the effluxion of time. Proceedings and conveyances under the act of 1867 should be shown in greater detail, yet even here only a brief synopsis seems necessary. The operation and effect of the law of 1898 being recent and continuous, more attention to details will be required. During the continuance of the national bankrupt law the operation of the State laws regarding insolvency is suspended.

Only a brief outline of the procedure of the bankruptcy court can well be shown in the abstract, which, in cases of this nature, is rather an index than a transcript. Sufficient, however, should be given to show the apparent regularity of the proceedings, and the assignee's or trustee's deed, where there has been a sale, should follow in proper sequence. These deeds like other conveyances by trustees, are usually long and prolix, and considerable discrimination must be exercised in preparing the abridgment.

The title conveyed by the assignee or trustee is no better than that held by the bankrupt, and the purchaser takes it charged with all the equities to which it was subject in his hands, and burdened with all liens which existed at the time of the adjudication.

The effect of an adjudication in bankruptcy being to deprive the person adjudged a bankrupt of his power to take or convey property while resting under such sentence, it is proper that his restoration to civil rights should also be shown whenever the abstract discloses him in the character of grantor or grantee after such adjudication. This may be accomplished by a simple note of the fact.

SECTION 32. AGREEMENTS FOR CONVEYANCE.

and contracts, or agreements to deed, are of frequent occurrence on the records, and occasionally bonds for the same purpose will be found, though these latter are now practically obsolete. Should the contract be executory its contents should be set forth with considerable minuteness, particularly such portions as relate to the parties, the subject-matter and the conditions of conveyance. If, on the other hand, the contract has been consummated by deed, a passing allusion to it, as a part of the chain of title, will be sufficient. Where the subsequent deeds do not show a substantial compliance with the agreement a full synopsis may become material, but the general rule is that the acceptance of a deed ordinarily merges any provisions of the contract which are different from the deed.⁷⁴

The effect of a valid contract for the conveyance of land, is to vest in the vendee the equitable estate, leaving the legal title in the vendor as a mere lien or security for the unpaid purchase money.⁷⁵ The vendor, in such a case, is simply a trustee having an interest in the proceeds but not in the land, and this interest, upon his decease, would pass to his personal representative and not to his heirs. The heirs would, it is true, take the legal title by descent, but only as it was vested in the ancestor, which was as a mere security for a debt. The debt being due to the administrators of the vendor, and the lien being considered as held by the

⁷⁴ Davenport vs. Whisler, 46 Iowa, 287; Jones vs. Wood, 16 Pa. St., 25. This is the accepted doctrine, yet it is subject to large qualification. The actual contract, as shown by the agreement, will still be compe-

tent where through fraud, inadvertence, or mistake, a different deed has been delivered. Snell vs. Insurance Co., 98 U. S., 85.
⁷⁵ Reed vs. Lukens, 44 Pa. St., 200; Cary vs. Whitney, 48 Me., 516.

heirs in trust, and simply as a pledge or security for its payment, on payment of the debt the heirs would be compellable in equity to execute the trust by the conveyance of the title, while the purchase money would go to the personal representatives.

No special form is required as an evidence of a contract of sale and the courts seem inclined to allow a wide latitude in this respect. If the terms of the contract, the consideration, the subject-matter of the sale, etc., are stated with reasonable certainty the memorandum is sufficient. Form is not important, nor need it be under seal, the one indispensable requisite being, that it be in writing and signed by the vendor or his agent.

Agreements for conveyance which do not contemplate an immediate sale are mainly resorted to by two classes: the one where, by reason of financial inability, no immediate consummation of the contract can be effected; the other, where parties desire to control the disposition of property for a limited time while awaiting other developments. In each case forfeitures often occur. Much stress is often placed by counsel upon the fact of unfulfilled contracts of sale appearing in the chain of title, and objections of a serious nature are frequently founded upon them, yet, as a rule, they are formidable only in appearance. Where a contract for the sale of land provides that if the purchaser fails to perform any of his covenants the vendor shall have the right to declare the contract null and void, a subsequent sale by such vendor to another party for a valuable consideration, after the time fixed for performance, is, in effect, a declaration of forfeiture of the purchaser's contract.⁷⁶

⁷⁶ Streeper vs. Williams, 48 Pa. St., 450; Grey vs. Tubbs, 43 Cal.,

364; Cummings vs. Rogers, 36 Minn., 317.

Subsequent purchasers of land, in the absence of express notice of latent equities in others than their grantors, can only be affected by such legal consequences as may be fairly drawn from the record itself; and when the record shows that the claim of a prior purchaser has been cut off and defeated by a sale or foreclosure, or by a forfeiture of his contract, such subsequent purchasers will have a right to rely on what is thus disclosed.⁷⁷

An unfulfilled contract of recent date, however, should always be closely scrutinized and the fact of forfeiture clearly established, for it must be remembered that a vendor in such a contract can do no act in derogation of his vendee's title when such vendee is not in default. Therefore, should the vendor convey to others while such contract is still subsisting, all persons who claim any interest in the land, with notice of the contract, will be held to perform such contract to the same extent that the original vendor would be bound if he had retained the title.

SECTION 33. LEASES.

A lease is a contract for the possession and profits of land on the one side, and a recompense of rent on the other. The estate or interest conveyed by a lease is personal in its nature, whatever may be the duration of the term, and falling below the character and dignity of a freehold, it is usually regarded as a chattel interest.

Where a lease is found upon the records which has expired by its own limitation it may be passed without notice. It can in no way affect the title; is

⁷⁷ Warren vs. Richmond, 53 Ill., 54;
Warder vs. Cornell, 105 Ill., 169.

not a charge or incumbrance, nor is it even a cloud. Hence, it may with propriety be disregarded unless followed by a subsequent renewal. When for a short or almost expired term it may be shown briefly, as it is a charge upon the fee, but when for a long term of years it should be shown fully and succinctly. When for ninety-nine years or longer, it has much of the dignity and many of the attributes of a conveyance of the fee and requires corresponding treatment. When shown fully the examiner should observe the names of the parties as in case of deeds; the dates; the description; the term; the rent reserved; the general and special covenants; the conditions and restrictions, and the special agreements, if any. The execution and authentication should comply with the statute.

Whenever a lease is of sufficient importance to show *in extenso* the entire instrument should be carefully perused by the examiner and the covenants and conditions critically observed. The aid of an experienced conveyancer is frequently dispensed with in preparing instruments of this character; printed forms are generally employed, and, when they are not attainable, copies are made from books of forms and old instruments. In this way covenants are created without being well understood, and which frequently astonish the parties to be bound when occasion arises which calls for the performance of them.

The covenants of leases are usually protected by a condition avoiding the estate and working forfeiture in case of breach, and this condition, which is of the essence of the lease, must always be noticed at such length as its importance seems to demand.

It is not uncommon for the landlord to give the tenant, by an agreement in his lease, an option to

purchase the demised premises, and whenever such agreements are inserted they should be displayed in the abstract.

SECTION 34. MISCELLANEOUS EVIDENCE.

There is a variety of instruments which do not rise to the dignity of deeds, but which yet have a direct bearing upon the question of title, and which must be included in all properly prepared abstracts whenever they appear upon the records during the period covered by the search. Of this nature are affidavits, letters, municipal ordinances, etc., all of which are proper, and, under certain conditions, competent evidence, in support of the facts presented.

Without entering into a discussion of the nature, requisites and validity of ordinances, which, as a rule, must be determined by reference to the charter of the municipality, it may be stated generally, that such ordinances must be adopted by the proper body and be published in the manner provided by law, the practical operation of an ordinance dating from its passage and publication. When so passed and published ordinances afford constructive notice to all persons bound to take notice of them.

The only occasions when it will be necessary to show the acts of municipal bodies, will be in respect to the opening or vacation of streets and alleys, with an occasional conveyance of municipal real estate, which latter event should be prefaced by a synopsis of the ordinance or resolution authorizing same. Being in the nature of public laws no record of municipal acts is required in the registry of deeds, and recourse must usually be had to the corporate records.

Certificates of officers having the legal custody or

supervision of records, as well as of ministerial officers in the performance of some legal duty, are of frequent occurrence. Usually they are appended to some kind of documentary evidence to which they have special relation, but they may be used as affirmative and independent proof of matters within the certifying officer's jurisdiction. Instances are afforded by the certificates of levy, attachment, etc., made by officers executing the process of courts and which afford internal evidence of the matters therein recited.

Aside from the certificates of officers, and others, reciting their own acts in connection with some particular proceeding in the line of their official duty, there is a class of official custodians who certify from the books, records, files, etc., committed to their care, and to whose certificates, under their official seal, if they have any, the statute in some cases and comity in others, attaches a certain degree of evidentiary value.

Certificates attached to other documents for the purpose of proof or verification do not, as a rule, require extended notice, but when standing alone, and as affirmative evidence of some particular fact, they acquire a certain dignity that calls for commensurate treatment. When these certificates, for instance, allude to facts which appear from the books, files and records of the officers of State in regard to the transfer of land by, or to the government, either Federal or State, or by the State to individuals, the original evidence of which is not accessible, or has been destroyed, or lost, they become of the highest importance and should be shown in detail.

In the compilation of English abstracts the general subject "incorporal hereditaments" plays a con-

spicuous part, but in the United States this term is now rarely employed, while the number of strictly incorporeal hereditaments is very small.⁷⁸ In this country they are usually such things as come within the definitions and general doctrines of easements and servitudes.

An easement is technically understood to be raised or created by a grant, but may be reserved in a conveyance as effectually as by a grant by deed. Separate instruments are seldom employed to create easements, but occasionally grants of rights of way will be found as well as instruments granting riparian rights, and in all cases, where such instruments are matters of record, purchasers of land affected thereby will take the premises subject to whatever rights they may confer upon others and burdened with the stipulated service.⁷⁹

In populous localities, party wall agreements are of frequent occurrence, and, though not technically conveyances of land, their legal effect is to give to each of the parties an easement on the other's land, which becomes appurtenant to their several estates and passes to their respective assignees by any mode of conveyance that may be effectual to transfer the land itself.

For a large variety of matters relating to interests in land and sales and conveyances of such interests, which by law are not required to be under seal or attested by any solemnity, epistolary correspondence, notes and memoranda, are competent evidence. This is particularly the case in regard to trusts, agreements

⁷⁸ The principal incorporeal hereditaments according to the common law, are: Advowsons and next presentations, tithes, manors, franchises, offices, com-

mons, rights of way, of light, wood, water, rents and annuities. Most of them are unknown in the United States.

⁷⁹ Turpin vs. R. R. Co., 105 Ill., 11.

and conditions of sale, and sometimes in supplying missing information relative to descents, etc. Hence, it is not uncommon to find letters of record relating to, or concerning interests in land. A contract for the sale of land made by letter correspondence between the parties is valid and will be enforced, if the consideration to be paid, the time of payment, and the description of the property appear sufficiently certain to enable a court to make a decree. So, too, where a person acquires title to land in trust for another and writes him a letter clearly showing that he holds the same in trust, this will be sufficient to manifest the trust as required by the statute of frauds.

In abstracting the proceedings of courts, in matters relating to title, affidavits will occasionally be met with, but as a rule, they are of such a nature that their contents are immaterial to the examination, and they may be disposed of in a single line and frequently passed without notice. There is, however, another class of affidavits, resorted to by conveyancers under a choice of difficulties, which frequently figure on the records and in the abstract. These are the *ex parte* sworn statements of individuals respecting some question raised by the examination, usually relating to deaths, marriages, births, etc., concerning which no other or better evidence can be found. Family records are not universal, nor even where, as is the custom of many states, a record of births, deaths and marriages is kept by proper officers, can the requisite information be always obtained. When such is the case resort must be had to the next best and most available testimony which is usually supplied by the affidavit of some person setting forth his knowledge of the matter under inquiry. Such instrument, it is true, possesses

no legal validity, and not being made under the sanction of a court or in any legal proceeding, is not strictly evidence for any purpose; yet, being all that can be adduced, it has been, as it were, by common consent, adopted as evidence in the examination of titles and the testimony taken as corroborative of general reputation, concurrent possession, etc. Such affidavits, though possessing no legal efficacy, should yet be attended with the same solemnities and formalities as are required in affidavits for use in court.

SECTION 35. WHAT TITLE SHOULD BE SHOWN.

In the absence of any stipulations to the contrary, the vendor, in every contract of sale, impliedly undertakes to furnish to the purchaser a marketable title. What is meant by the expression "marketable title"? It may be briefly stated in answer, that the title disclosed should extend to show a full and perfect right to property and present possession vested in the vendor. It must also embrace the entire estate or interest sold, and that free from the lien of all burdens, charges, or incumbrances, and should not only be free from litigation, but from palpable defects and grave doubts.⁸⁰ It should consist of both the legal and equitable titles, and be fairly deducible of record. It may still be a valid title, even though charged with incumbrances. The terms of the contract of sale will, in most instances, determine the question of title when raised, but ordinarily, while a purchaser will not be compelled to accept a title palpably defective, he cannot justify his refusal to accept by mere captious objections, nor is it sufficient for him, when the juris-

⁸⁰ Smith vs. Robertson, 23 Ala. 312; Holland vs. Holmes, 14

Fla., 390; Scott vs. Simpson, 11 Heisk. (Tenn.), 310.

diction of a court is invoked to compel him to perform his contract, merely to raise a doubt.

A defect in a record title, will, under most circumstances, furnish a defense to a purchaser, particularly where it affects the value of the property or would interfere with its sale, and thus render it unmarketable, but there is no inflexible rule, in the absence of stipulations to the contrary, that a vendor must furnish a perfect title of record, and it has frequently been held that defect in the record or paper title may be removed by parol evidence.⁸¹ Where, however, the title depends upon a matter of fact which is not capable of satisfactory proof, or, if capable of that proof, yet is not so proved, the title is not marketable and the purchaser is not obliged to take it.

A title, to be marketable, need not necessarily be deducible of record, for a prescriptive title may, under proper conditions, be as strong a title by grant,⁸² yet such titles, unless there has been a continuous holding for at least twenty years, are always liable to defeat from undisclosed defects, and even after the expiration of such period they may still be open to attack through claims by minor heirs or persons under disability.

Again, a valid title, as is self evident, should be free from latent defects or taint of fraud; yet this is something that, from its very nature, must frequently pass undetected, even by the exercise of the greatest prudence. As a rule, however, where the legal title is vested in the vendor, and there is nothing appearing from which purchasers can know that there has been any fraud in his acquisition of title, or any invalidity

⁸¹ *Hellreigel vs. Manning*, 97 N. Y., 56.

⁸² *McNab vs. Young*, 81 Ill., 11.

in any of the deeds of his chain of title, they will be protected in the purchase.

SECTION 36. FLAWS IN THE TITLE.

The term "flaw" is used to describe an apparent gap or break in the chain of title, which, when occurring constitutes in many cases an unsurmountable impediment. A requisition must in such case be made for the missing links, whether the interruption be partial, as where one of several persons shown to possess a unity of interest fails to convey, or entire, as where no privity of title is shown to exist between present claimants and past owners. Where the original title fails, and requisitions for the purpose of showing connection are returned unsatisfied, the title asserted becomes adverse to the original title and necessarily inquiries *in pais* must be made to show an indefeasible title by adverse possession.

An apparent break in the chain often occurs in the case of descents, the estate of the intestate never having been settled in probate; and when the only heirs are married women, and conveyance is subsequently made by them, if no description of the person or of the capacity in which they grant is given, the break, upon the record, will, of course, be complete. When a grantee under an unrecorded land contract has gone into possession, but no deed has ever been made, the same state of facts will exist in respect to conveyances by him. Again, and these cases are by no means uncommon, simple or ignorant people frequently go into possession under deeds which they never cause to be recorded, and this apparently breaks the continuity of interest and title. Requisitions, in many instances, will suffice to discover the missing evidence,

but when this cannot be found, possession and claim of title under the statute of limitations must be relied on.

A serious defect of the character under consideration will frequently be found at the very initiation of title, the abstract showing only the original entry at the government land office, supplemented, possibly, by the local record of the Receiver's duplicate receipt. Now, it is immaterial how long the premises may have remained in private occupancy, nor through how many hands it may have passed; the title, in such a case, is only an equity, for no limitation runs against the government. Yet, such defects are very common. From a very early day in the history of the public land system, settlers and purchasers seem to have been strangely indifferent in the matter of securing possession of the government patents for their lands, and in hundreds of thousands of instances the foundation of title, as exhibited by local records, to lands purchased from the government, some of them of vast present value, is merely the duplicate receipt above alluded to. Probably, this indifference has arisen chiefly from ignorance on the part of purchasers that a patent constitutes the only positive evidence of the transfer of title from the government to the individual, but whatever may be the cause the fact exists,⁸³ and this vital link, showing the original derivation of title, should be restored whenever it is found to be wanting.⁸⁴

⁸³ It would seem from the report of the Commissioner of the General Land Office for the year 1875, that at that time there were remaining in the files of the general and local land office nearly *two millions* of uncalled for patents, covering probably not less than

150,000,000 acres, no small proportion of which were lands purchased from the government more than half a century before, lying in the older states of Ohio, Indiana, Illinois, etc.

⁸⁴ The initial statements taken from the government Tract Book will always furnish a clue

SECTION 37. CLOUDS UPON TITLE.

Frequently the examination of an abstract will disclose minor defects, imperfect descriptions, invalid instruments, and abortive attempts at conveyance, which, while not reaching the merits of the title, nor yet, in many cases, casting any suspicion upon it, still tend in a measure to obscure it. These defects are generally known as "clouds upon the title."

As a general rule, a deed, lien, charge or incumbrance of any kind, to cast a shadow upon title so as to give the owner relief in equity, must be one that is regular and valid on its face, but is, in fact, irregular and void from causes or circumstances that have to be proved by extrinsic evidence. If the invalidity plainly appears on the face of the instrument, or, although not apparent on the writing, if it is shown by any of the preliminaries that attend it, or in any of the links which connect it with the title, so that no lapse of time or change of circumstances can weaken the means of defense, such an instrument does not, in any just sense, even cast a cloud upon the title or diminish the security of the owner of the land. The rule in such cases is, that an instrument of this character can work no mischief, and hence, no occasion arises for equitable interference for its removal or cancellation.

SECTION 38. INQUIRIES IN PAIS.

Technically, when an attorney is called to pass the title to land under a given state of facts as presented by an abstract, he is not presumed or supposed to extend his investigations beyond what is directly

to a break of this kind, and a certified copy of the patent can be obtained from the General

Land Office by any person showing himself to be entitled to it.

or inferentially disclosed therein. The absence of requisite links in the chain of title calls for inquiries respecting same, but the existence of unrecorded evidence, or of equities not apparent or fairly deducible, do not properly come within the province of an examining counsel.

It is, however, strongly recommended, that in addition to the inquiries and requisitions made during the perusal of an abstract, and which are raised by disclosures made therein, a further inquiry be directed to the present possession and occupation of the land under examination. A long series of adjudicated cases confirms the doctrine that open and exclusive possession of land affords notice of the claim of the person so in possession,⁸⁵ and a purchaser of land at the time adversely held by another who does not inquire of the party in possession as to his title or right of occupancy, will not be considered a *bona fide* purchaser, notwithstanding he may have examined the registry of titles.⁸⁶ A purchaser of land who examines the records is protected by them so far as they can protect him, but he necessarily takes the risk of having the actual state of the title correspond with that which appears of record. The registration laws are designed only to protect purchasers against latent equities; hence, unrecorded deeds are void as against subsequent purchasers without notice, but a purchaser from the record owner is bound to notice the possession of another, and takes subject to the right indicated by such possession.⁸⁷

⁸⁵ Redden vs. Miller, 65 Ill., 336;
Hackett vs. Callender, 32 Vt.,
97; the rule is the same both at
law and in equity; Griswold
vs. Smith, 10 Vt., 454.

⁸⁶ Russell vs. Sweezy, 22 Mich., 235;

Warren vs. Richmond, 53 Ill.,
52.

⁸⁷ Pinney vs. Fellows, 51 Vt., 525;
Perkins vs. Swank, 43 Miss.,
349; Happin vs. Doty, 25 Wis.,
573.

In any event, the safe course is to make the inquiry, for the law will not extend its protection to those who through negligence or inattention suffer an advantage to be taken of their credulity, nor will it afford relief to those who neglect to examine and by personal observation ascertain the knowledge of those facts of which they are presumed to be conversant.

An actual inspection of the premises should also be had for the express purpose of ascertaining whether there are any servitudes resting upon the land that have not been disclosed by the abstract. It is true that, as a rule, a claim for an easement must be founded upon a grant by deed, yet an easement may pass by implication, when its existence is necessary to the enjoyment of that which is expressly granted or reserved. This is well illustrated in the rule of the common law which provides that where the owner of two heritages, or of one heritage of several parts, has arranged and adapted them so that one derives a benefit or advantage from the other of a continuous and obvious character, and then sells one of them without making mention of these incidental advantages or burdens of one in respect of the other, there is, in the silence of the parties, an implied understanding and agreement that the advantages and burdens, respectively, shall continue as before the separation of the title.⁸⁸

But in order that an easement should pass by implication, under the grant of an estate, it must be obvious to any observer, while an apparent sign of servitude must be impressed upon the servient estate;

⁸⁸ *Morrison vs. King*, 62 Ill., 30; *Lampman vs. Milsk*, 12 N. Y., 505.

in other words, the marks of the burden must be open and visible.⁸⁹ Where these conditions exist, their effect upon the servient estate is frequently productive of results that the purchaser neither anticipated nor intended, but of which he might have been fully apprised had proper inquiry and examination been made prior to the acceptance of the title.

Where any doubt exists with respect to lines, courses or dimensions, a survey should be had to fix boundaries.

SECTION 39. OPINIONS OF TITLE.

A formal opinion upon the merits of the proffered title does not seem to be contemplated by the English system of abstracting, and this feature is doubtless an American idea. The queries, objections, requisitions, etc., of an English examiner, in a measure, take the place of a formal opinion as they tend to note and point defects and make suggestions whereby defects may be remedied and missing links supplied. But, as abstracts are now prepared in this country, a carefully framed opinion is an inseparable incident and a fitting climax of nearly every examination.

There are two methods of framing opinions of title, both of which are in general use. The first, and most common, consists of statements based upon, and annexed to, a formal abstract, and is made by counsel after a perusal thereof; the second is where the examiner, after investigating the title, by personal examination of the records, or of his own indices thereto, places the title in some person named, subject to whatever impairments he may find of record.

⁸⁹ *Butterworth vs. Crawford*, 46 N. Y., 349.

This latter method is also known as "certifying the title." No chain or affirmative evidence is shown in such cases. Frequently the certificate is based upon a directed assumption of title in a particular person at a certain date, and the examiner certifies from his examination of the records from such date. In the latter case the certifier, it will be seen, assumes the dual office of examiner and counsel, a plan, however, that has little to recommend it. The most satisfactory results are always obtained by a thorough disassociation of abstract maker and counsel.

As a rule, however, few lawyers care to have anything to do with the search or with the compilation of the abstract, further than such incidentals as necessarily result from the inquiries, requisitions and objections made with respect to the title.

The opinion of counsel is based in the first instance, upon the presumption, necessarily entertained, that the examiner has faithfully performed his work and that the abstract is a true reflex of the records, and of every matter and thing shown thereby that apparently affects, impairs or implicates the title under consideration. It may consist of a bald statement of the title shown by the abstract, with no comments or suggestions, or it may indicate the weakness of the title with recommendations for strengthening same. Inasmuch as the client often seeks professional aid quite as much for assistance in perfecting title, this matter will, of course, depend largely on the client's wishes.

If the abstract is for any reason unmerchantable it is better to take proper steps to remedy the defect, if possible, before proceeding to peruse same, but if the client is willing to accept the abstract as furnished and directs an opinion thereon, counsel should spe-

cifically note the defective features thereof in his opinion. The term, "merchantable" has now come to be a recognized expression among lawyers, to denote an abstract compiled and certified by a responsible person and which is accepted without question by the profession. There are no rules for determining the fact of merchantability and the matter rests largely in general consensus of opinion, the resolutions of Bar Associations, etc.

In every case the language of an opinion should be clear and perspicuous. This is a prime requisite. Hypothetical statements should be avoided. So also, the use of qualifying adjectives in connection with title is very objectionable. At law all titles are valid or invalid. It is not good form, therefore, to say that a "good" title is vested in any person, for this implies that there may be a "better," while a "bad" title is simply no title. As colloquial phrases such terms may, and do, have a definite meaning, but in formal written opinions they are out of place. The title should be specifically found in whomsoever it may be made to appear; if it is obscured, or insecure in the person named, the facts of insecurity should be stated and their legal effect announced. There is no such thing in law or fact as a doubtful title *per se*, although the claim of an individual may be the subject of doubt.

In a finding of title the estate should always be mentioned. While we are accustomed to speak of the title to land yet this is not strictly accurate. It is the interest in land, or the estate, that is held by a title, not the land itself, and a properly framed opinion should indicate the nature and extent of the interest. To find that the title is vested in a person named is not enough; he may have title, and a "good" title, and yet not have the ultimate ownership. If the abstract

discloses that the person named is possessed of the fee this fact should be stated. If there are several united in ownership this fact should be stated and the character of the estate held by them, whether jointly or in common, should be announced. If any lesser estate than the fee is shown, then, in most cases, the ownership of both the particular and the ultimate estates must be found.

SECTION 40. LIABILITY FOR ERRONEOUS OPINIONS.

An attorney employed by a purchaser of real property to investigate the title of the grantor prior to the purchase, impliedly contracts to exercise reasonable care and skill in the performance of the undertaking, and if he is negligent or fails to exercise such reasonable care and skill in the discharge of the stipulated service, he is responsible to his employer for the loss occasioned by such neglect or want of skill. Like conditions and results also follow an employment to investigate and ascertain whether property offered is a safe¹ or sufficient security for a loan of money.

The obligation imposed on the attorney does not require of him the possession of perfect legal knowledge or the highest degree of skill in relation to business of that character, nor that he will conduct it with the greatest degree of diligence, care, and prudence, but simply that he shall possess the ordinary legal knowledge and skill common to members of the profession; and that in the discharge of the duties he has assumed, he will be ordinarily and reasonably diligent, careful and prudent.⁹⁰ This is the undertaking of every attorney in every branch of legal employment, and while courts have ever been inclined to exercise leniency in

⁹⁰ *Gambert vs. Hart*, 44 Cal., 543; *Skil-
len vs. Wallace*, 36 Ind., 319.

dealing with questions of this character the rule has always been strictly enforced whenever the facts have been brought within its operation. Hence, it follows, as a necessary sequence, that if the attorney fails to bring to the discharge of the duties assumed by him, the ordinary legal knowledge and skill possessed by the members of the profession, or has failed to discharge the duties with ordinary and reasonable care and prudence, he will be guilty of negligence, and liable to the client for the damages he may have sustained by reason thereof.⁹¹

In most of the cases where the question has been raised the errors charged have related mainly to the management of suits, and consisted in the non-observance of established forms and legal rules. But the principle is just as applicable to opinions and assurances of title and the attorney must be held to a strict accountability for acts of negligence. If he acts in good faith, however, to the best of his skill, and with an ordinary degree of attention, he will not be responsible.⁹² Neither is he liable for mere errors of judgment, nor for mistakes of law in matters where the law is not well settled.⁹³ These are general principles of universal recognition.

It is a further rule, that an attorney is liable for the negligent performance of professional duties, arising from ignorance or want of care, only to the person who employed him—that is, to one between whom and the attorney a contract of service existed. To insure a recovery for any injury arising from mere negligence, however gross, the rule seems to be imperative that there must exist between the one inflicting the injury and

⁹¹ Spangler vs. Sellers, 5 Fed. Rep., 882.

⁹² Wilson vs. Russ., 20 Me., 421.

⁹³ Dodd vs. Williams, 3 Mo. App., 278; Morrill vs. Graham, 27 Tex., 646.

the one injured, some privity, by contract or otherwise, by reason of which the former owes some duty to the latter, and the rule applies with full force to acts of an attorney in framing an opinion of title. A third party, therefore, who may have acted upon the opinion would be without remedy against the attorney unless something in the circumstances of the case should take it out of the general rule.⁹⁴ Malice, fraud, collusion or other tortious act would be sufficient to create a responsibility without reference to any question of privity between the tortfeasor and the injured party, but where these elements are wanting no recovery can be had by a third party, and a contract between two persons will not be held to inure to the benefit of a third person from the mere fact that its breach, or the negligent discharge of the duties involved in it, has resulted in injury to another.⁹⁵

SECTION 41. PERUSING AN ABSTRACT.

It is difficult to lay down hard and fast rules for any matter that depends to a great extent on the habits and mental methods of the individual. This is strictly true of the perusal of an abstract. The writer suggests, that whether the abstract be long or short, or whether the title be simple or complicated, a general perusal, in order to obtain a preliminary view should first be made. This perusal is only to establish the fact of an apparent chain of title from its source, the government, or from some person proposed in whom the title is assumed to have been vested. To assist in arriving at a correct estimate, an analysis of the abstract must always be made in intricate cases, and such a course will be found

⁹⁴ *Savings Bank vs. Ward*, 100 U. S., 195; *Buckley vs. Gray*, 110 Cal., 339.

⁹⁵ *Buckley vs. Gray*, 110 Cal., 339.

helpful in every case. Having established the fact of apparent title extending in unbroken sequence from the initial point to the person in whom it is last asserted, a critical review of every remove⁹⁶ must then be made to determine its effect and validity. All defects, whether of form or substance, are noted on the analysis just mentioned, together with notes of discrepancies, objections, and requisitions for further information. Each step must be examined technically and critically, and its own sufficiency or insufficiency passed upon. This task is the most arduous part of the examination, for the sufficiency of every instrument and proceeding must be investigated not only with respect to itself but frequently with reference to numerous other instruments in the chain and sometimes in connection with matters not disclosed in the abstract.⁹⁷

Any matter that is not in itself or the context sufficiently self explanatory must be made the subject of a requisition for further information. Thus, where a descent is suggested by the abstract, as where a deed is shown purporting to be executed by the "heirs at law" of the person last seized, a call should be made for further inquiry or evidence touching the legitimacy of the claim of title thus asserted. So, too, of a partition among heirs, by the mutual interchange of deeds, in which a minor's rights may be involved.

Frequently a death is suggested inferentially, as where a man and wife convey, and on a subsequent revesture of title the man alone executes a deed. In the same way a marriage may be suggested, and in every case, where an individual conveys with no words

⁹⁶ For want of a better name, each link in the chain, whether by deed, will, mortgage, lease, etc., is called a "remove," and the removes are all numbered

seriatim from the beginning, and referred to by number whenever occasion calls for reference.

⁹⁷ Warvelle on Abstracts, 700.

descriptive of the person, inquiry should be made in regard to marriage.

Much trouble is frequently had with judgments against the person, where the judgment debtors have names the same as those mentioned as grantors or grantees in the abstract. Great care, therefore, should be observed in these matters. If the names are identical with those of the persons who now own the land under investigation, or who at some former period have held title or possessed equities capable of being reached by execution, then any doubts that may arise should be resolved by a requisition. Affidavits of identity and disclaimer are about the best available means for determining this point. A certificate by plaintiff's attorney, when such can be procured, will also serve to remove doubts concerning the identity of persons bearing the same name.

SECTION 42. CONCLUSION.

In the foregoing brief and necessarily fragmentary sketch, an attempt has been made to present a succinct statement of the methods now generally observed in the preparation of abstracts of title in the United States. In some respects the compilation of abstracts has not yet passed the experimental stage, but the essentials are now fairly agreed upon by lawyers and conveyancers and the substance of this agreement may be found in the foregoing pages. To those who may desire a larger knowledge or more intimate acquaintance with the subject, the perusal of Mr. Warvelle's exhaustive treatise is recommended. This is particularly true with respect to the technical details of compilation, the keeping of abstract indices, and the forms employed in writing up the history of title.

NINETEENTH SUBJECT.

Mining Law.

CHAPTER I.

INTRODUCTORY AND HISTORICAL.

SECTION 1. DEFINITION.

"A mine, strictly speaking, is a tunnel, shaft, or other opening in the earth made for the purpose of getting out the underlying minerals;¹ but the word is also used to denote the vein or deposit of mineral and likewise the parcel of land in which such vein or deposit is found."

"By the term 'minerals,' is meant all the substances in the earth's crust which are sought for and removed by man for the substance itself. It is not limited to metallic substances, but includes salt, coal, clay, stone of various sorts, etc.,² and even petroleum and natural gas have been held to be minerals."^{3 4}

SECTION 2. MINING LAW—A BRANCH OF LAW OF REAL PROPERTY.

Strictly speaking, mining law is a branch of the law of Real Property. The ownership of land (at least under the common law), carries with it the ownership of all minerals found under the surface.⁵ Minerals differ from the other elements which make up the corpus of the Real Property in that the value of the minerals consists in their use after their severance from the land and their conversion into personal property.

¹ Coal Run, *Coal Co. vs. Jones*, 127 Ill., 379; *Marrow vs. Flimby*, etc., *Coal Co.* (1898), 2 Q. B., 599.

² *Clayton vs. Gregson*, 5 Ad. & El., 302, 31 E. C. L., 342; *Rosse vs. Wainnam*, 14 M. & W., 859;

Henry vs. Lowe, 73 Mo., 96.

³ *Gill vs. Weston*, 110 Pa. St., 313; *Murray vs. Allred*, 100 Tenn., 100, 66 Am. St. Rep., 740.

⁴ Am. & Eng. Ency. of Law, Vol. XX, Page 682-683.

⁵ See Section 6, Real Property.

The laws governing mines and the working of mines, therefore, present many striking contrasts to the law in any other division of real property.

Feudalism, which, as has been seen, was the basis for the general system of law relative to real property in England, exerted only a slight and passing influence upon mining law. The common law principles relative to the ownership and working of mines presented a striking contrast in many respects to the law of other countries, especially those whose laws on this subject are taken from the Roman or Civil laws.

SECTION 3. COMPARISON BETWEEN THE CIVIL LAW AND THE COMMON LAW RULE AS TO THE OWNERSHIP OF MINES.

“The continental systems were the outgrowth of the civil law, which, without exception, furnished the basis of the laws of nearly every country in Europe outside of Great Britain, and to some extent there. Naturally, therefore, their systems followed the principles of the civil law, by which it was established that the ownership of all was primarily vested in the State, and that all mines of gold or silver in public lands belong to the state or sovereign, as a part of the sovereign patrimony, whence it followed that the right of severance could be exercised, and the minerals granted to one and the land to another, or the land and minerals together. But in private lands, closely analogous, to the rule of the common law, and probably the foundation of it, the minerals belonged primarily and *prima facie* to the owner of the soil, with this condition or limitation, similar to the rule prevailing in Russia, that if worked by the owner he was bound to render the tenth part to the sovereign as a right attaching to

the crown; and if worked by another with the consent of the owner, there was a fixed and standing royalty of one-tenth to the crown and one-tenth to the owner.⁶

“By the rule of the common law from the earliest time, *prima facie* and as a general rule, the owner of the soil owned all beneath it, with the limitation only—the burden of showing which was upon the person attempting to rebut the presumption of ownership—that ‘Royal mines’ belonged to the crown or sovereign. By some of the earlier statutes and decisions there was some doubt as to what was included in the term ‘Royal mines,’ the attempt being made to include copper and tin as well as gold and silver; and by others a distinction was sought to be made between the values of baser metals and those of gold and silver. This, however, was virtually settled by the statute of William and Mary,⁷ by which it was ordained that the enjoyment of all mines in which tin, copper, iron or lead were found, notwithstanding any quantity of the precious metals intermixed, was secured to the subject.”^{8 9}

SECTION 4. “ROYAL MINES” IN ENGLAND.

As was seen in the last section, the right of land ownership in the minerals found beneath their land was limited by the rights of the Crown, in what was known as “Royal mines.” The subject of “Royal mines” is thus discussed by a recent English writer on the subject: “According to the law of England, the only mines which are termed Royal, and which are the exclusive property of the crown, are mines of gold and silver. . . . It seems formerly to have been a matter of considerable dispute as to what constituted

⁶ Gamboa Com. Rockw. Transl. ch. 2, Sec. 1.

⁷ Vice vs. Thomas, Stan., p. 35, 2 Bl. Com., p. 18, 1 id., 294.

⁸ 1 Wm. & Mary, ch. 30; 5 id., ch. 6, Collier Mines, p. 2.

⁹ Snyder on Mines, Vol. I, Secs. 6 & 7.

a royal mine. By some it was considered to be a principle of the common law, that, if any gold or silver was found in metals of a baser nature, there was sufficient to bring the mine within the definition of a royal mine; while by others a mine was not to be deemed royal unless the quantity of gold or silver exceeded in value that of the other minerals with which it was mixed. The latter opinion was adopted by three of the judges, viz., Harper, Southcott and Weston, in the case of the Queen and the Earl of Northumberland, although they agree in thinking that, as the defendant in that case had confessed the production of some royal ore, he was concluded by his not having proceeded to show the relative difference of value, and that the mine must therefore be presumed to be royal. But all the other mine judges were of the opinion that the existence of any portion of gold or silver was sufficient to constitute a royal mine. Plowden himself contends that if the royal metals should bear the expenses of extraction, the whole should belong to the crown, and if otherwise, to the owners of the base metals. This decision occurred in the time of Queen Elizabeth, when the prerogative of the crown was perhaps at its greatest height, and the opinion of the nine judges 'does not appear to have gained the acquiescence of more recent lawyers.' ¹⁰

This right of the Crown in "Royal mines" was variously assigned to the virtue of the prerogative,¹¹ the King's right of coinage,¹² and the excellence of the thing.¹³

¹⁰ Bainb. Mines, 1 Am. (from 3rd London ed.), ch. 2, sec. 3, pp. 24-27, citing Queen vs. Earl of Northumberland; Plowd, 336, 2 Coke, Inst., 577, 78.

¹¹ 1 Bl. Com., 294; Collier Mines, p.

1, 2 Co. Inst., 577; Bainb. Mines, p. 24, McSwinnay Mines, p. 26; Rockw. Span. and Mex. Law, p. 514.

¹² 1 Bl. Com., 294, 2 Co. Inst., 577.

¹³ Plowd., 31, 310. See, also Pettus

SECTION 5. SOURCES OF MINING TITLES IN THE UNITED STATES.

"In the United States there are at least two independent systems of sovereignty which may be exercised in respect of mines and mineral lands, namely: that of the original thirteen states, and of the other states in respect to state lands, and that of the United States or federal government over the portion of the United States acquired by purchase other than as embraced in the first thirteen states and the states carved out of territory belonging to them. The state lands proper are again divided into at least two systems—those which belong to the original thirteen states, over which the federal government never had any natural or original jurisdiction as owner of the soil, and those embracing territory of the United States as acquired afterwards. In the former, there are traces of rights dependent upon colonial grants, which were mentioned in the last preceding section, and which will be referred to specifically wherever necessary herein.

"The sovereign power and authority which every nation has over the lands and property belonging to it are expressly recognized in the federal constitution, and conferred upon the Congress of the United States. Having this power conferred upon it by the constitution, it necessarily follows that Congress also has the

Fodinae Regales; *Collier Mines*, p. 1; *Queen vs. Northumberland*, *Plowd.*, 336; *Plowd.*, 31, 310. "The reason assigned by writers who place this right upon the 'excellence of the thing', is the puerile apology of the sycophant, and would scarcely be made by an English judge or writer of the twentieth century. But since the royal prerogative

in England under the early common law, was an arbitrary power to do good and not evil, and since it was a fiction of the law that the King could do no wrong, it would seem that the act of seeking the further excuse for the exercise of this function than that of prerogative is one of supererogation."

power to fix the rules and laws by which it will dispose of the mineral lands of the United States, and whether it will segregate the minerals or dispose of land and minerals together, or adopt the system of royal claim, or withhold them altogether. With few exceptions, which will be noticed in the part of this work treating of patents, the United States parts with the fee absolutely, and of course, in such case, its grantee gets the minerals, subject to the easement or estate, in certain cases elsewhere shown, of the right of an adjoining proprietor to penetrate his ground in following vein on its downward course.

“Manifestly, in the United States, the same doctrine must apply as to all lands occupied as public streets, which obtains in England. And in such case, where the title has never passed from the United States or the state, as the case may be, the minerals under the street must belong to the state or United States in virtue of its sovereignty. Where, however, the ultimate fee of the street or road-bed, as the case may be, is in a proprietor other than the occupant, it would follow that the owner of the fee in all cases would own the underlying mines. And as to mines beneath navigable river beds, there is undisputed authority from very early times that they belong to the sovereign. There are cases authorized by law, which are fully considered elsewhere in this work where minerals are reserved out of a patent granted by the United States. But the United States parts with the title to mineral lands as such in only one way. There are no regalian rights in the United States.”¹⁴

¹⁴ Snyder on Mining Law, Vol. I, Sec. 15.

CHAPTER II.

LAWS GOVERNING MINES.

SECTION 6. SOURCES OF MINING LAW IN THE UNITED STATES.

The existing mining laws in force in the United States, are drawn from several sources, as follows: (1) United States Statutes; (2) State Statutes; (3) Rules of Mining Districts; (4) Customs. These four sources will be considered in the above order in the four following sections.

SECTION 7. UNITED STATES STATUTES.

The mining rules of the highest authority are those found in the United States Statutes. The present system of Federal laws governing mines and mining are contained in the Act of July 4, 1866, with the acts supplementary and amendatory thereto.¹ The Federal Statutes on the subject do not, and do not pretend to cover the whole field of mining law. The adoption of mining rules by the miners of each mining district is expressly authorized, and the passage of mining laws by State and Territorial governments is impliedly recognized by the following provision in the Federal Statutes: "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked

¹ U. S. Rev. Stat., Sec. 2318, et seq.

on the ground so that its boundaries can be readily traced. All records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine, upon which such failure occurred, shall be open to re-location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest his claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing, or by pub-

lication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini, eighteen hundred and seventy-two."

The various provisions of the Federal Statutes relative to mining law will be discussed in their appropriate places, in the remaining chapters of this subject.

SECTION 8. STATE STATUTES.

The states and territories are authorized to legislate respecting the location, manner of recording, and amount of work necessary to hold possession of a mining claim, and nearly all the mining states and territories have passed statutes more or less elaborate on this subject.²

SECTION 9. RULES OF MINING DISTRICTS.

"The origin of mining districts and of their rules was in the mining camps of California, in 1849, before any territorial form of government had been established and the same system was followed and prevailed wherever valuable discoveries in other sections induced an influx of prospectors.

"Practically all the Pacific slope and the land east of the mountains to the Missouri River was then public

² Amer. & Eng. Ency. of Law, Vol. XX, p. 685; Johnson vs. McLaughlin, 1 Ariz., 493; People

vs. District Ct., 11 Colo., 147; In re Monk, 16 Utah, 100.

domain. The vast ore bodies of the Comstock, the wealth of the Alder Gulch, the veins and placers of Pike's Peak, and of countless intermediate mineral localities were all appropriated and their values extracted under the protection of this form of local self-government for many years, with no paternal interference by the National Legislature.

"Each local camp called itself a mining district as defined by the action of a mass meeting of the miners. Some of them were less than a mile square, others quite extensive, and they have become permanent geographical divisions for purpose of description in the conveyance of real estate of all kinds in the mining counties.

"After defining the name and local extent of the district, these meetings usually designated certain officials to be elected from time to time, and then proceeded to adopt rules regulating the size of claims, prerequisites of location and for annual labor or periodical representation in some form.

"Before the territorial organizations were complete, and while the diggings were remote from organized society, they often took a much wider scope and provisions were made for executive officers, for miners' courts, and covering all sorts of subjects. But these incidents have long since ceased.

"Where the districts, as quasi municipal organizations have been abandoned, provisions have generally been made to preserve their records in the County Recorder's office.

"With almost no interference by State or Territorial Acts, they were mining laws of the land until the Act of Congress of July 26, 1866. This but slightly limited their authority, but the Act of May 10, 1872, covered so many essential incidents, and has been so

supplemented by State and Territorial legislation, that they have been gradually abandoned, and survive now only as a name or description.

"Only in California, Utah and Alaska are the organizations still preserved to any extent. Where not extinct, their existence is practically confined to the keeping of district records for the registry of locations, with regulations defining the size of claims and details of location. Undoubtedly where there is no State or Territorial Statute, a district can yet be organized, and details of location fixed by its rules, but any attempt to revive old districts or enact new district rules in any State or Territory which has any pretense of a mining code would only tend to confusion.

"The details of these rules were not altogether arbitrary or experimental. In many respects they followed precedents already long established in Spain and Mexico. The requirements of discovery and discovery shaft, of sinking and record, periodical labor, forfeiture, for non-representation and many others, are duplicates more or less close, of like provisions of the Royal Code of 1783, but enacted by these local conventions of practical miners in entire ignorance of the existence of such code." ³

The existence of a district mining law is a question of fact for the jury.⁴ District rules once proved are presumed to continue.⁵

SECTION 10. MINING CUSTOMS.

The customs of miners are regarded as the common law of mining,⁶ and their force has been recognized and

³ Rockwell's Spanish and Mexican Laws, p. 25.

⁴ Harvey vs. Ryan, 4 M. R., 490 42 Cal., 626.

⁵ Riborado vs. Quang Pang M. Co., 6, p. 125.

⁶ Watervale Min. Co. vs. Leach (Ariz.), 1893, 33 Pac. Rep., 418; Rosenthal vs. Ives, 2 Idaho, 244.

continues in force by Acts of Congress.⁷ Mining customs must yield to Federal or State Statutes, but a mining custom, reasonable in itself, and generally observed, will prevail against a written mining regulation which has fallen into disuse.⁸

⁷ Eberle vs. Carmichael, 8 N. Mex. 169; King vs. Edwards, 1 Mont. 235; Mountain Silver Min. Co. vs. Willis, 127 U. S., 471.

⁸ Harvey vs. Ryan, 4 M. R., 490. 42 Cal., 62.

CHAPTER III.

LANDS OPEN TO EXPLORATION AND PURCHASE AS MINES, UNDER THE STATUTES OF THE UNITED STATES.

SECTION 11. MINERAL LANDS OPEN TO PURCHASE BY CITIZENS.

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."¹

"Title to mineral lands cannot be acquired by occupancy unless for the purpose of mining or extracting minerals."²

"Under this statute the public lands are free and open to exploration and occupation by the citizen for his own profit. This applies to all land containing valuable deposits, including building stone. The right thus granted necessarily carries with it the license to take what may be found in the course of exploration and apply it to the discoverer's own use, or option is left to him to acquire the exclusive right to the land containing deposits; but if he does not choose to do so, he may still avail himself of the deposit exclusively

¹ U. S. Rev. Stat., Sec. 2319.

² Burns vs. Clark (1901), 133 Cal., 634.

or in common with others, unless some one else acquires the exclusive right from the government. In getting stone upon the public domain, the person is not a trespasser; by taking it and bestowing his labor upon it, or causing labor to be bestowed upon it, by an employee, he becomes the owner of it in fact against every person.”³

Limestone has been held not to come under the provisions of this Act, since the mining laws were intended to embrace only deposits of ore, and the term mineral excludes the idea of any nonmineralized deposit,⁴ but there are decisions to the contrary.⁵

“The Land Department of the government has the power to determine the character, as mineral or nonmineral, of land for which a patent is asked, unless the determination of that question is committed by Congress to the local courts.”⁶

SECTION 12. LANDS WHICH CANNOT BE LOCATED ON.

“As the language in the statute implies, only public mineral lands of the United States are open to exploration, location, and purchase. It therefore follows that where land is appropriated or occupied under a claim of title or right—that is, where there is a prior location subsisting, or the land is reserved from sale, or has been previously granted by some valid and subsisting grant—no location can be made on it or title to it acquired from the United States, because, in contemplation of law, it does not belong to the United States.”⁷

³ See act of Aug. 4, 1892; 27 Stat. L., 348; Sullivan vs. Schultz (1899), 22 Mont., 541.

⁴ Wheeler vs. Smith, 5 Wash. 704.

⁵ Sullivan vs. Schultz, 22 Mont., 541.

⁶ Steel vs. St. Louis Smelting, etc., Co., 106 U. S., 447; Johnson vs.

Towsley, 13 Wall. (U. S.), 83; Quinby vs. Conlan, 104 U. S., 426; Shepley vs. Cowan, 91 U. S., 330.

⁷ Amer. & Eng. Ency. of Law, Vol. XX, p. 688.

A properly constituted Indian reservation is not public land of the United States, until the Indian title is extinguished, and a mineral location thereon is void.⁸ Land included in a military reservation is incapable of being located upon;⁹ as are also forest and park reserves.¹⁰

The statute relating to the location of townsites on the public lands, provides that title shall not be acquired thereunder to any mine of gold, silver, cinna-bar, or copper, or to any valid mining claim or possession held under existing law. Under this statute it is held that valid mining locations are, by operation of law, excepted from the grant and do not pass; nor does the townsite grant interfere with them.¹¹

"In all the grants to the subsidized railroads, with the public land states and territories, all mineral and mineral lands, except coal and iron were reserved and excepted from the grant.¹² By earlier decisions such reservations were construed to mean 'known mines' or lands, known to contain minerals at the time of filing the map of definite location, but the later cases overturn this doctrine and hold the language of the grant is to be construed to mean just what it says, namely, that mineral lands are reserved, and no right whatever, attaches thereto, until the issuing of a patent, unattended with any act of concealment, misrepresentation, or fraud on the part of the grantee."

⁸ Am. & Eng. Ency. of Law, Vol. XX, p. 690; Kendall vs. San Juan Silver Min. Co., 144 U. S., 658.

⁹ Ft. Maginnis, 1 Land Dec., 552. Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral land laws of the United States.

¹⁰ U. S. vs. Gear, 3 How. (U. S.), 120; Wilcox vs. Jackson, 13 Pet. U. S., 498.

¹¹ Am. & Eng. Ency. of Law, Vol. XX, page 691; Dower vs. Richardson, 151 U. S., 661; Robbins vs. Milwaukee, etc., R. Co., 6 Wis., 636.

¹² Barden vs. Northern Pac. R. Co., 154 U. S., 288; Smith vs. Northern Pac. R. Co., 19 U. S. App., 131.

CHAPTER IV.

WHO MAY LOCATE CLAIM.

SECTION 13. IN GENERAL.

The Federal Statutes provide that mining claims may be located either by citizens of the United States, or by those who have declared their intention to become citizens.¹ Under this statute it has been held that a private corporation formed under the laws of a state, whose members are citizens of the United States, may locate a mining claim on the public lands of the United States.² A minor may become a locator of mineral lands under this statute. No requirement that the citizen shall be of any particular age is expressed.³

SECTION 14. ALIENS.

“The Mining Acts throw open the public domain to citizens only, and to those who have declared their intention to become citizens.

“It would seem from their language that an alien could not locate a claim, and if he could not locate his holding by deed and perhaps by devise or descent, might be questioned.

“But the matter in its practical importance is controlled by the rule laid down in opinions of the Federal Supreme Court ⁴ that the question of ownership by an alien is a matter between himself and the government, and that as long as the government does not

¹ U. S. Rev. Stat., Sec. 2319.

² *McKinley vs. Wheeler* (1889), 130 U. S., 635. See, also, *U. S. vs. Trinidad Coal, etc., Co.* (1890), 137 U. S., 168.

³ *Thompson vs. Spray* (1887), 72 Cal., 531.

⁴ 152 U. S., 505; *McKinley Co. vs. Alaska Co.*, 183 U. S., 563.

make inquisition to deprive him of his title, or become a party to proceedings to perfect the title, his title, even when he claims under his own location is good against all the world." ⁵

SECTION 15. LOCATION BY AGENTS.

A location may be made by an agent, and in such a case, written authority from the principal is not necessary.⁶ In such a case, however, there must either be a previous authorization to use the name of a principal or a subsequent ratification or adoption of the act. Where the name of an absent person is used without his knowledge, there is no legal owner to the claim—no person to stand for its paternity—and the location is not good, as against a later valid appropriation.⁷

⁵ Morrison's Mining Rights, p. 308.

⁶ Murley vs. Ennis, 2 Col., 300; 12

M. R., 360; Dunlap vs. Pattison, 42 P., 504.

⁷ Morrison's Mining Rights, p. 58.

CHAPTER V.

KINDS AND EXTENT OF CLAIMS.

SECTION 16. IN GENERAL.

The two important kinds of mining claims are "lode" and "placer" claims. Subsidiary to these are "tunnel" claims and "placer" claims containing a "lode." The Federal statutes make separate provisions for the acquisition and working of each species of claims.

SECTION 17. LODES AND VEINS.

The word "lode" and the word "vein" are used indiscriminately in the Acts of Congress as well as in the popular language, to signify the same thing. In Bainbridge on Mines, the text¹ defines them in the same sentence: "A mineral lode or vein is a flattened mass of metallic or earthly matter, differing materially from the rocks or strata in which it occurs." A note to the same suggests the use of the word "vein" as incorrect, when applied to such deposits as those of anthracite coal. But the note is not justified, for the word "vein" is universally used to include coal, and other flat, non-metallic deposits, while the word "lode" is not so used. This is the principal distinction in the use of the words. The word "lode" is of Cornish origin,² "vein" is Latin. In the Eureka case,³ where it is said every known definition was presented to the Court, the opinion does not intimate any difference to their meaning, but says: "Those Acts give no defini-

¹ Bainbridge on Mines, p. 2.

² Bullion Co. vs. Croesus Co., 2 Nev., 176.

³ Eureka Case, M. R., 578.

tion of the term 'lode.' They use it always in connection with the term 'vein.' ''⁴

The word "ledge" came into use in California after the discovery of the quartz mines, because they were generally found in the hills above the gulches, and were often identified with protruding outcrop. The word "reef" not used in the Acts, is the popular equivalent for lode or ledge in Australia and South Africa. The word "range" is much used in the lead districts of the Mississippi Valley.⁵

The provisions in the Federal Statutes as to the location of lode claims are as follows: "Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other.'"⁶

⁴ Morrison's Mining Claims, 2. 162.

⁵ Raisbeck vs. Anthony, 4 K. N. W., 72.

⁶ U. S. Rev. Stat., Sec. 2320.

In general, it may be said that a lode or vein is a body of mineral or mineral body of rock, within defined boundaries in the general mass of the mountain. The thinness or thickness of the matter in particular places does not affect its being a vein or lode. If there is a general and pervading continuance of this mineral matter, with a casual and occasional interruption, but pursuing the same general course, bounded by the same rocky material above and below as far as you can trace that until it breaks off totally and is interrupted for a very large distance, it is a vein of rock or mineral matter.⁷

A vein or lode that has never been claimed; that has not been located; that has not been marked out by metes and bounds, and in which there has been no actual development, or, to use the language of the statute, "discovery of a vein or lode within the limits of the claim located," is not a vein or lode such as is described in this section.⁸

A vein or lode cannot be in place, within the meaning of this section, unless it be within the general mass of the mountain. It must be inclosed by, or held within, the general mass of fixed and immovable rock. It is not enough to find the vein or lode lying on the top of fixed or immovable rock, for that which is top is within, and that which is without the rock in place cannot be said to be within it.⁹

The statute prescribes two prerequisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land of the United States within the limits of his claim of a mineral-

⁷ *Stevens vs. Williams* (1879), 1 McCrary (U. S.), 488.

⁸ *Iron Silver Min. Co. vs. Sullivan*

(1883), 16 Fed. Rep., 829.

⁹ *Leadville Min. Co. vs. Fitzgerald* (1879), 15 Fed. Cas. No. 8, 158.

bearing lode, and the distinct marking of the boundaries of his claim so that they can be readily traced. No appropriation of the land is made until both these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but when these requirements have been complied with the land is no longer public, but the possession, and the right to acquire the title, are irrevocably vested in the locator. There is no requirement in the legislation of Congress that the discovery shall be made before the location, or that the location shall precede the discovery.¹⁰

A location can only rest upon an actual discovery of the vein or lode.¹¹

Subsequent discoveries may validate earlier locations, and the latter may then inure to the benefit of the locators as against the United States and all parties whose claims were initiated subsequent to the discoveries. But they would inure to their benefit as of the dates of the discoveries and not as of the dates of the locations, and they would neither destroy nor affect intervening rights. The marking of boundaries and filing of location certificates may precede discovery or discovery may precede them, but no location is valid until both are complete. The earlier act then inures to the benefit of the locator as of the date of the later, subject to all rights which have intervened between them.¹²

“When a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting

¹⁰ *Erwin vs. Perego* (C. C. A., 1899), 93 Fed. Rep., 608.

¹¹ *King vs. Amy, etc., Min. Co.* (1894), 152 U. S., 227; *Echardt vs. Boaro* (1885), 113 U. S., 536.

¹² *Uinta Tunnel Min., etc., Co. vs. Creede, etc., Min., etc., Co.* (C. C. A., 1902), 119 Fed. Rep., 169.

and developing the claim, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification, that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found.''¹³

The locator's rights of possession and enjoyment are thus defined by the Federal Statutes: "The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical sidelines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical places drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.

¹³ Bonner vs. Meikle (1897), 82 Fed. Rep., 697; Muldrick vs. Brown (1900), 37 Oregon, 185.

And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.”¹⁴

“The estate acquired by the locator of a mining claim is an interest in real property, and although the paramount title remains in the government, the courts have universally recognized such interest as a freehold; and in all controversies arising between the locator and other persons as to any right or claim thereto, he is treated as the owner in fee.”¹⁵

Upon the death of the owner of a mining claim, the right of possession is to be deemed and treated as an interest in real estate and must descend accordingly. That the right of possession descends to the administrator cannot be inferred from the use of the term “legal representative.”¹⁶

“The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfill which forfeits the locator’s interest in the claim. We do not think that under the Federal statute the locator takes such an estate in the claim that dower attaches to it.”¹⁷

SECTION 18. TUNNEL CLAIMS.

“Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all

¹⁴ Fed. Statutes, Vol. 5, p. 13, Sec. 2322.

¹⁵ Mt. Rosa Min. etc., Co. vs. Palmer (1899), 26 Colo., 56; Forbes vs. Gracey (1876), 94 U. S., 762.

¹⁶ Keeler vs. Trueman (1890), 15 Col., 143.

¹⁷ Black vs. Elkhorn Min. Co. (1896) 163 U. S., 450.

veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months, shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.”¹⁸

This section contemplates that tunnels may be run for the development of veins or lodes or for the discovery of mines, gives a right of possession of such veins or lodes if not previously known to exist, and makes locations on the surface after the commencement of the tunnel invalid. There is no implication of a displacement of surface locations made before the commencement of the tunnel. There can be no implication of a conflict with the rights given by section 2322; those rights are exclusive, and a tunnel can only be run in subordination to them.¹⁹

The effect of this section is to withdraw from exploration for lodes not appearing on the surface so much of the public domain as lies upon the face of a tunnel, and to reserve such for the benefit of the proprietor of the tunnel so long as he prosecutes his work thereon with reasonable diligence, and gives him the right of possession for this purpose, and such tunnel locator may avail himself of the provisions of section 2326.²⁰

¹⁸ U. S. Rev. Stat., Sec. 2323.

¹⁹ Calhoun Gold Min. Co. vs. Ajax Gold Min. Co. (1901), 182 U. S., 507.

²⁰ Back vs. Sierra Nevada Consol. Min. Co. (1888), 2 Idaho, 420.

SECTION 19. PLACER CLAIMS.

The following provisions of the Federal Statutes relate to the location of "placer" claims:

"Claims usually called 'placers' including all forms of deposit excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

"Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide preemption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

"Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims

cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or preemption purposes.”

A placer location gives a qualified possession of the ground located; that is to say, it confers upon the owner the exclusive right of possession of the surface area for all purposes incident to the use and operation of the same as a placer mining claim, and all unknown lodes or veins, but does not give right of possession to known lodes or veins within its limits. The right to the possession of such lodes or veins can be acquired only by locating them as lode claims.²¹

A patent for a claim can in no case exceed 160 acres; that is, for a single claim, and it cannot be so much, except in the case of an association of persons. An association may take 160 acres; an individual claimant can have only twenty acres.²²

SECTION 20. COAL LANDS.

The provisions in the Federal Statutes as to the acquisition of coal lands from the government are as follows:

“Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity

²¹ Mt. Rosa Min., etc., Co. vs. Palmer (1899), 26 Col., 59.

²² St. Louis Smelting, etc., Co. vs. Kemp. (1879), 21 Fed. Cas. No 12, 239a.

of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

"Any person or association of persons severally qualified as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved; Provided, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

"All claims under the preceding section must be presented within sixty days after the date of actual possession and the commencement of improvements on the land, to the register of the proper land district, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be

allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

“The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the property notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.”

CHAPTER VI.

ESSENTIALS OF VALID LOCATION.

SECTION 21. IN GENERAL.

In order to secure a valid mining claim there must be a discovery of the vein in the case of a lode claim,¹ a proper location, including the posting of notice, and (generally) a proper recording of notice.

SECTION 22. LOCATION.

The location of a lode consists in defining its position and boundaries, and in doing such acts as indicate and publish the intention to occupy and hold it under the license of the United States.

The formal parts of location include:

1. The location notice at discovery.
2. The discovery shaft.
3. The boundary stakes.

Although a very old custom, the requirement of the Colorado Act of 1866, repeated in the Act of 1874, as to a location stake was not always considered imperative, but there are decisions under the present statute which enumerate it as one of the constituent parts of a complete location.²

In fact this location notice was in early locations the principal and often the only specific act of location. It was a universal custom before any statutes existed purporting to regulate location.

The words of the act require "a plain sign or notice," but there has never been any uniformity among

¹ See Section 17 as to what will supply this necessity for a discovery of a vein.

² *Strepey vs. Stark*, 7 Colo., 618; *Cheesman vs. Shreeve*, 40 F, 787; 17 M. R., 260.

prospectors in the details of the notice, or in the mode of posting it. It may be substantially complied with by writing on a blazed tree or on a board nailed at discovery or by legible carving, or by any other rude but honest form of notice, so that it be intelligible and open to observation; but the loose practice of writing on a chip or stick thrown into the discovery hole, is an attempt to evade or abuse the fair requirements of the law. In *Gird vs. California Oil Co.*,³ the notice was placed in a tin can on a mound of stones and it was ruled a proper posting. The following

Form of Notice on Stake.

The Famine Lode, discovered by Patrick Corcoran, February 17, 1907. I claim 750 feet easterly and 750 feet westerly from discovery. Patrick Corcoran.

fully complies with the law and custom, and would still be sufficient without signing at the foot and without stating the number or direction of feet claimed.⁴

This notice need not call for monuments or ties—that is required of the record only.⁵ Such notice holds the claim for a reasonable time before setting the boundary stakes or other work.⁶

The discovery must be sunk upon unoccupied public land; that is to say, it must be outside of the lines of any patent or even of any valid location.⁷

The details of location are mainly regulated by State statutes.⁸

³ 60 F., 581; 18 M. R., 45.

⁴ Morrison's Mining Rights, pp. 35-6.

⁵ Poujade vs. Ryan, 33 P., 660;
Brady vs. Husby, 33 P., 801.

⁶ Union Co. vs. Leitch, 64 P., 829.

Upton vs. Larkin, 6 P., 66; Watson vs. Mayberry, 49 P., 479; Peoria Co. vs. Turner, 79 P., 915.

⁸ See Statutes of several states.

SECTION 23. RECORDING LOCATION.

The Federal Statutes do not require the recording of a location notice, leaving this question to be determined by State statutes or mining district regulations.⁹ Such a recording is required by statute in the different States.

The time to record the location certificate is fixed by statute in Colorado within three months; North and South Dakota and Wyoming, 60 days; Alaska and Washington, 90 days, from date of discovery.

Utah within 30 days after date of posting; Montana and Oregon, 60 days from such date; Nevada, 90 days from date of posting; New Mexico, three months from such date; Arizona and Idaho, within 90 days from date of "location."

In California, no time is fixed by statute.

Where there is no organized mining district, and therefore no district recorder, the certificate should always be filed with the county recorder.¹⁰

⁹ See U. S. Rev. Stat., 2324.
Southern Cross Co. vs. Europe
Co., 15 Nev., 383; Nans vs.

Victoria Co., 160 U. S., 318.
¹⁰ Morrison's Mining Rights, p. 77.

CHAPTER VII.

ESTATE SECURED BY LOCATION.

SECTION 24. IN GENERAL.

“A location perfected as required by law gives to the locator the exclusive right of possession of the surface ground and all the veins of every kind, not only the one located, but all others including spurs, off-shoots, and cross-veins, the tops or apexes of which lie within the surface boundaries.”¹

The estate of the locator of a claim, however, is both a limited and a conditional one. He has only a right to use the land, included within the boundaries of his claim for the purpose of searching for minerals and for purposes incidental thereto. He loses all interest in the property by failure to do a specified amount of work each year on his claim. The locator does not acquire a complete right to the use of the surface of the land for all purposes.

While the location of a mining claim withdraws the land from the public domain so that no rival claimant can successfully initiate any right to it until such location has been avoided and entry canceled, it does not divest the legal title of the United States or impair its right to protect the land and its product, by either civil or criminal proceedings, from trespass or waste, and the occupant has no right to cut timber on the claim prior to the payment to the United States of the purchase price of the land.²

¹ Amer. & Eng. Ency. of Law, Vol. XX, note 3, page 722.

² Teller vs. U. S. (C. C. A.) 1901, 113 Fed. Rep., 273.

SECTION 25. EXTRA-LATERAL RIGHTS.

The question of the extra-lateral rights of a locator has been thus summarized by the Supreme Court of the United States in the case of *Del Monte Min., etc., Co. vs. Last Chance Min. Co.*³

“Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein, the top or apex of which lies inside of such surface lines extended downward vertically becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing, he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along, but across the course of the vein. In such case, the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location.”

The surface lines extended downward vertically determine the extent of the claim, except when in its descent, the vein passes outside of the line, and the outside

³ 171 U. S., 89.

portions are to lie between vertical places drawn downward through the end lines. This means the end lines of the surface location, for all locations are measured on the surface. "The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein. This difficulty must often occur where the lines of the surface location are made to control the direction of the vertical planes. The remedy must be found, until the statute is changed, in carefully making the location, and in postponing the marking of its boundaries until explorations can be made to ascertain, as near as possible, the course and direction of the vein. In Colorado, the statutes allow for this purpose sixty days after notice of the discovery of the lode. Then the location must be distinctly marked on the ground, and thirty days thereafter are given for the preparation of the proper certificate of location to be recorded. Even then, with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein. But whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location, than that they should be subject to perpetual readjustment according to subterranean developments made by mine workings. Such readjustment at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims. The rule, whatever hardship it may work in particular cases, should be settled, and thus prevent, as far as practicable, such uncertainty." ⁴

⁴ Iron Silver Min. Co. vs. Elgin Min., etc. (1886), 118 U. S.,

206; Fitzgerald vs. Clark (1895) 17 Mont., 100.

When the owner is in possession of the surface and apex of a vein, he must be deemed to be in possession of all parts of the vein to which he has title, though it departs beyond his side lines, just as he is in possession of that portion of the earth vertically beneath his surface, and when he has followed it, he commits no wrong and is not a trespasser.⁵

SECTION 26. RIGHTS UNDER DEFECTIVE LOCATION.

Every locator is bound by the location which he himself makes. The courts cannot make a new location for him, and thereby enlarge his rights.⁶ They can only give him such rights as his imperfect location warrants.

SECTION 27. CROSS VEINS.

The statutory provision as to cross veins, is as follows:

“Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of the union, including all the space of intersection.

“The words ‘intersect’ and ‘cross’ as used in this section are not strictly synonymous and in using both, it must be presumed, intended to provide for different conditions. Veins might intersect, either on their strike or dip, and not cross; in that event, it was

⁵ Montana Ore Purchasing Co. vs. Boston, etc., Consol. Copper, etc., Min. Co. (1903), 27 Mont., 536.

⁶ King vs. Amy, etc., Min. Co., 152 U. S., 222.

necessary to provide which location should have the ore at the space of intersection, and it was declared that the prior location should have the ore within that space. In case they crossed, then a further provision was necessary, and it was provided that the junior location should have the right of way through the space of intersection for the convenient working of the mine.”⁷

This section has a controlling effect over section 2322 R. S., and limits the rights of the first locator of a mine in and to cross and intersecting veins to the ore which may be found in the space of intersection. If there are in fact two lodes crossing each other in these locations, the party having the elder title by patent has the better right, and it is limited as last stated. If there are two veins uniting in their downward course, this section is applicable.⁸

The provisions of this section refer to the intersection or crossing of veins either upon their strike or dip; the space of intersection, in determination of ownership of ore within such space, means either intersection of veins or conflicting claims according to the facts of each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins which he owns or controls outside of that space.⁹

When two veins for two mining claims belong to one person unite, and the vein thus formed continues down until it strikes a third vein belonging to another, the priority will be determined as between the date of the earliest of the two former claims and that of the third claim.¹⁰

⁷ Calhoun Gold Min. Co. vs. Ajax Gold Min. Co. (1899), 27 Colo., 178.

⁸ Hall vs. Equator Min., etc., Co. (1879), 11 Fed. Cas. No. 5, 931.

⁹ Calhoun Gold Min. Co. vs. Ajax Gold Min. Co. (1899), 27 Colo., 22.

¹⁰ Little Josephine Min. Co. vs. Fullerton (C. C. A., 1893), 58 Fed. Rep., 521.

SECTION 28. PLACER CLAIM CONTAINING LODE.

The statute has recognized what the experience of the miner has proven, that the same land may contain both a placer and a lode; or more accurately speaking, that placer ground may likewise contain a vein or lode.¹¹ When this occurs, both may be located by the same claimant and patent so acquired, or the placer claim may be located by one locator and the lode by another locator.^{12 13}

¹¹ Reynolds vs. Iron Silver Min. Co.,
116 U. S., 687; Noyes vs.
Mantle, 127 U. S., 348.

¹² Iron Silver Min. Co. vs. Sullivan,
5 McCreay (U. S.), 274.

¹³ Am. & Eng. Ency. of Law, Vol.
XX, p. 699.

CHAPTER VIII.

FORFEITURE, ABANDONMENT AND RELOCATION.

SECTION 29. ABANDONMENT.

As has already been stated the rights of a locator of an unpatented mining claim are only the rights of usage of the property, and are lost by abandonment.¹

Such a thing as a conditional abandonment can not be recognized. Where the owner allows strangers to hold a claim under color of title, standing by and intending to resume work only in case its development shows pay, his action amounts to abandonment.²

Lapse of time, though not conclusive, is an incident tending to prove abandonment.³ Proof that a stranger had relocated ground as abandoned does not prove that it was in such condition.⁴

SECTION 30. FAILURE TO PERFORM ANNUAL LABOR.

The provisions of the Federal Statutes as to the requirements for the performance of annual labor on each claim are as follows:

* * * "On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be

¹ *Merritt vs. Judd*, 6 M. R., 62; 14 Col., 59; *Mallett vs. Uncle Sam Co.*, 1 M. R., 18; 1 Nev., 188.
² *Trevaskis vs. Peard*, 44 P., 246.

³ *Beaver Co. vs. St. Vrain Co.*, 6 Colo. App., 130.

⁴ *McGinnis vs. Egbert*, 8 Colo., 41; 15 M. R., 329.

performed or improvements made by the first day of January, eighteen hundred and seventy-five, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. * * * Sec. 5 A. C., May 10, 1872.

"Sec. 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States, be amended by adding the following words: 'Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini, eighteen hundred and seventy-two. Jan. 22, 1880.'"

Any work done for the purpose of discovering minerals is improvements within the spirit of the statute.⁵ Road building is counted as annual labor.⁶ Flumes, drains, or the turning of a stream or the sinking of a common shaft will count.⁷ Work done by any party in privity of title with the owners,⁸ and even work gratuitously contributed will count.⁹

⁵ U. S. vs. Iron Silver Co., 24 F., 568.

⁶ Doherty vs. Morris, 289, 85.

⁷ St. Louis Co. vs. Kemp., 104 U. S., 636; 11 M. R., 692.

⁸ Godfrey vs. Faust, 101 N. W., 118.

⁹ Anderson vs. Caughey, 84 P., 223.

Work done beyond the lines will count when it has direct reference to the drainage or development of the claim.¹⁰ Whether the work done on one is really for the benefit of the group is for the jury to say.¹¹ Where sundry claims are worked together as one group, the development work though confined to a single claim may count for all.¹²

A house for the use of the miners built 200 feet away from the claim cannot be considered as annual labor.¹³

The expense of taking timbers, lumber, bucket, rope and tools to the mine—all carried away after slight use, if used at all—will not avail for annual labor.¹⁴

Taking specimens for assays will not count for annual labor nor as a legitimate resumption of work.¹⁵ The cost of sharpening tools may or may not be a legitimate item, according to circumstances.^{16 17}

SECTION 31. FORFEITURE TO CO-OWNER.

* * * “Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse

¹⁰ Packer vs. Heaton, 9 Cal., 569, 4 M. R., 447.

¹¹ Wilson vs. Triumph Co., 569, 300.

¹² Chambers vs. Harrington, 111 U. S., 350.

¹³ Remington vs. Bandit, 9 Pac., 819.

¹⁴ Honaker vs. Martin, 27 P., 397.

¹⁵ Bishop vs. Baisley, 43 P., 936

¹⁶ Hirschler vs. McKendricks, 40 P., 290.

¹⁷ Cases from Morrison's Mining Rights, pp. 100-110.

to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.”¹⁸

“Although one co-owner has expended more than enough to hold the claim, the delinquent co-owner to save forfeiture under the Act of Congress, is only required to pay or tender his proportion of the amount which the law required to be expended upon the claim.”¹⁹

The following is the form generally used in such forfeiture notices:”

FORFEITURE NOTICE. (A).

GEORGETOWN, COLO., January 3, 1908.

You are hereby notified that I have expended during the year 1907 *one hundred dollars* in labor and improvements upon the *Corinne Lode* Mining Claim, situate on *Republican Mountain* in *Griffith* Mining District, County of *Clear Creek*, State of Colorado, the location certificate of which is found of record in *book 20, page 222*, in the office of the recorder of said county, in order to hold said claim under the provisions of section 2324 of the Revised Statutes of the United States, and the amendment thereto approved January 22, 1880, concerning annual labor upon mining claims, being the amount required to hold said lode for the period ending on the 31st day of December, A. D., 1907. And if, within ninety days from the personal service of this notice, *or within ninety days after the publication thereof*, you fail or refuse to contribute your proportion of such expenditure as a co-owner, which amounts to fifty dollars, your interest in the claim will become the property of the subscriber, your co-owner, who has

¹⁸ U. S. Rev. Stat., Sec. 2324.

¹⁹ Morrison's Mining Rights, p. 115, 13th Ed.

made the required expenditure, by the terms of said section.

(Signed)

SECTION 32. RELOCATION.

There are two kinds of relocation known to the law. There can be a relocation of a valid claim upon a new discovery of a vein, or there may be a relocation of an abandoned claim.

By relocation upon the shaft showing the mineral afterwards discovered, this danger can be avoided where no hostile discovery has intervened. But a new record based on a new discovery is an abandonment of the original location.²⁰

In relocation of abandoned claims, the party locates and records with the same particularity as in making an original location or record. The only practical distinctions are that he may, if found standing, adopt the stakes of the old claim. And his discovery shaft may be by sinking the old one deeper. He has the same rights as an original discoverer, although not in strictness a discoverer at all.²¹

²⁰ Beals vs. Cone, *supra*.

²¹ Armstrong vs. Lower, 6 Colo.,

393; 15 M. R., 631; Pelican Co. vs. Snodgrass, 9 Colo., 339.

CHAPTER IX.

PATENTS ON MINING CLAIMS.

SECTION 33. STATUTORY PROVISIONS.

The obtaining of patents for mining claims is regulated by the Federal Statutes as follows:

“A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place, on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land-office, and shall thereupon be entitled, to a patent for the land, in the manner following: The register of the land-office, upon the filing of such application, plat, fieldnotes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim;

and he shall also post such notice in his office for the same period. The claimant at the time of the filing of this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended on improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office, at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper office of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. Provided, That where the claimant for a patent is not a resident, of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and affidavits required to be made in this section by the claimant for such patent may be made by his, her or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits; And Provided; That this section shall apply to all applications now pending for patents to mineral lands." ¹

¹ U. S. Rev. Stat., Sec. 2325.

A failure to file an adverse claim is a waiver of all rights.² The claimant of a tunnel site is not required to file an adverse claim and submit his rights in the lode claims it crosses to adjudication by the land department upon the filing of applications for patents to those claims when his rights are at that time uncertain, contingent, and intangible.³

“The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the land department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured. Especially is it true that where the United States has not received any damage or injury, and can obtain no advantage from the suit instituted by it, the conduct of the parties themselves, for whose benefit such action may be brought, must itself be so free from fault or neglect as to authorize them to come, with clean hands, to ask the use of the name of the government to redress any wrong which may have been done to them.”⁴

² Nesbitt vs. Delamar's Nevada Gold Min. Co. (1898), 24 Nev., 273; Lee vs. Stahl (1886), 9 Colo., 208.

³ Ellet vs. Campbell (1893), 18 Colo., 510.

⁴ U. S. vs. Marshall Silver Min. Co. (1899), 129 U. S., 589.

CHAPTER X.

SPECIAL TOPICS IN MINING LAW.

SECTION 34. EMINENT DOMAIN.

The government has the right to take mining property, as much as any other species of property by the right of eminent domain.¹

It has been held in some cases that mine owners may exercise the right of eminent domain for the purpose of taking property necessary for the development of their mines.²

SECTION 35. RESPECTIVE RIGHTS OF THE PARTIES WHEN SURFACE AND MINERAL ESTATES ARE SEVERED.

The ownership of the minerals may be vested in one, while the ownership of the surface is in another. This severance is often created by deed, in which case it amounts practically to a partition on a horizontal plane, the two estates being entirely separated, except that from the nature of the case, the surface owner can usually claim such incidental use of the surface as is necessary to enable him to mine the minerals.³

When minerals are so severed they form a separate part of the free hold and the estate is not a mere easement.⁴ Whether the right of entry on surface can be enlarged so as to allow the erection of coke ovens and

¹ Titcomb vs. Kirk, 51 Colo., 288.

² Bliss vs. Kingdom, 46 Cal., 651.

³ Caldwell vs. Fulton, 3 M. R., 238, 31 Pa., 475; Horner vs. Watson, 14 M. R., 1; 79 Pa., 242; Mar-

vin vs. Brewster Co., 13 M. E., 40, 55 N. Y., 538.

⁴ Bonson vs. Jones, 56 N. W., 515; Plummer vs. Hillside Co., 104 F., 208.

its use for powder house, blacksmith shop and supply stores depends upon the circumstances of the case as found by the jury.⁵

⁵ Williams vs. Gibson, 16 M. R., 243; 4 So., 350.

QUESTIONS.

REAL PROPERTY.

CHAPTER I.

Page 11.

1. What is included under the term Real Property?

Pages 12-18.

1. Give an account of the Feudal System.

Pages 19-22.

1. Describe livery of seisin.

Pages 23-25.

1. Who was Littleton?

Page 26.

1. Who was Sir Edward Coke?

Page 27.

1. Define ownership.

Page 28.

1. Define possession.
2. Define enjoyment.

Page 29.

1. What is included under the term "land"?

Page 30.

1. What is included under the term "tenements"?

Page 31.

1. What is included under the term "hereditaments"?
2. What are incorporeal hereditaments?

Page 32.

1. What are easements?

Page 33.

1. What are fixtures?
2. What are emblements?

Page 34.

1. Distinguish between estates and titles.
-

CHAPTER II.**Page 35.**

1. How are estates classified as to their quantity?
2. What is a freehold?

Pages 36=37.

1. What is an estate in fee-simple?

Pages 38=44.

1. What is an estate in fee-tail?

Page 45.

1. How are life estates classified?

Page 46.

1. What are the conventional life estates?

Page 47.

1. What are the legal life estates?

Pages 48=49.

1. What were the principal forms of dower?

Page 50.

1. What is an estate of homestead?

Page 51.

1. What are the estates less than free-hold?

Page 52.

1. What is an estate for years?
2. What is an estate at will?
3. What is an estate from year to year?

Page 53.

1. What is an estate at sufferance?
-

CHAPTER III.**Page 55.**

1. How are estates classified as to quality?

Page 56.

1. What are estates upon condition?
2. What is the effect of a condition precedent?

Page 57.

1. What is the effect of a condition subsequent?

Page 58.

1. What is a restriction?
2. What is an estate upon limitation?

Page 59.

1. Compare an estate upon limitation with an estate upon condition subsequent?

Page 60.

1. What is a conditional limitation?

CHAPTER IV.

Page 61.

1. What is a reversion?
2. What is a possibility of reverter?
3. What is a remainder?

Page 62.

1. How are remainders classified?

Page 63.

1. What is a contingent remainder?

Pages 64-75.

1. Name some of the principal rules governing contingent remainders?
-

CHAPTER V.

Page 77.

1. How are estates classified as to the number of owners?
2. What is a joint tenancy?

Page 78.

1. What is a tenancy in common?

Page 79.

1. What is an estate by entirety?
2. What is an estate in coparcenary?

Page 80.

1. What estate have partners in land owned by the partnership?

CHAPTER VI.

Page 81.

1. What is title?

Page 82.

1. What is an original title?

Page 83.

1. What are the methods by which original title may be acquired?

Page 84.

1. How may title be acquired by discovery?
2. How may title be acquired by occupancy?
3. How may title be acquired by conquest?

Page 85.

1. How may title be acquired by cession?
2. What is a derivative title?

Page 86.

1. What is a title by descent?

Page 87.

1. Describe the civil law and the canon law methods of reckoning degrees of collateral relationship.

Page 88.

1. Give Blackstone's seven canons of descent.

Page 89.

1. What is included under title by purchase?

Page 90.

1. In what two ways may property be transferred by the public?

Page 92.

1. What is a devise?

Pages 93-104.

1. Describe executory devises.

Page 105.

1. In what cases does title arise from natural causes?

Page 106.

1. When does title arise from civil or political relations?

Page 107.

1. What is title by prescription?
 2. What is a statute of limitations?
-

CHAPTER VII.**Page 109.**

1. Who may be grantors?
2. Who may be grantees?

Page 110.

1. What are the necessary parts of a deed?
2. On what material must a deed be written?

Page 111.

1. What is the habendum of a deed?

Page 112.

1. What is a covenant?

Page 113.

1. What are the five common covenants?
2. When did signing of a deed become necessary?

Page 114.

1. What is delivery in escrow?

CHAPTER VIII.

Page 115.

1. How is land described in a deed?

Page 116.

1. What is an exception?
2. What is a reservation?

Page 117.

1. Describe the American system of land parceling.

Page 118.

1. What is a plat?
 2. What is a subdivision?
-

CHAPTER IX.

Pages 119-120.

1. Describe the contest in English History between those who desired to allow, and those who desired to prevent, the alienation of real estate.

Pages 121-141.

1. What was the rule in Shelley's Case?

Page 142.

1. What is an equitable estate?

Page 143.

1. When will there be a merger of estate?
-

CHAPTER X.

Page 145.

1. What were the principal forms of common law original deeds?

2. What were the principal forms of common law derivative deeds?

Page 147.

1. What effect did the Statute of Uses have upon the methods of conveyancing in England?
2. What are the two principal forms of modern deeds?

QUESTIONS.

QUESTIONS ON ABSTRACTS.

Page 151.

1. Define an abstract.
2. From what documents is an abstract compiled in England?
3. From what documents is an abstract compiled in the United States?

Pages 152-154.

1. Compare the English and American methods of abstracting.

Pages 155-156.

1. What are the essentials of an abstract?

Pages 157-158.

1. Explain the duties and liabilities of an abstractor.

Pages 159-160.

1. Is it the duty of the vendor to furnish an abstract to the vendee?

Page 161.

1. What are the sources of information used by an abstractor?

Pages 163-165.

1. Explain the doctrine of notice.

Page 166.

1. What is registration?
2. What is its effect?

Page 167.

2. What are indices?

Page 169.

1. Explain the method of compilation of abstracts in the United States.

Pages 170-171.

1. What are the formal parts of an abstract?

Pages 172-175.

1. What are the initial statements?

Page 176.

1. Describe Congressional grants.

Page 177.

1. What is a patent?

Pages 178-181.

1. How should the various deeds of conveyance be noted in an abstract?

Page 182.

1. Describe corporate conveyances.

Page 183.

1. How must conveyances by delegated authority be made?

Pages 184-186.

1. How must official conveyances be made?

Pages 187-191.

1. How should testamentary conveyances be noted on an abstract?

Page 192.

1. How should title by descent be shown on an abstract?

Pages 193=194.

1. What liens, charges and incumbrances should be shown by an abstract?

Page 195.

1. What is the doctrine of lis pendens?

Page 197.

1. What attachments should be shown in an abstract?

Pages 198=200.

1. What judgments and decrees should be shown in an abstract?

Pages 202=206.

1. What judicial and execution sales should be shown in an abstract?

Pages 207=211.

1. What actions and proceedings should be shown in an abstract?

Pages 212=215.

1. What are tax titles?
2. How should they be shown in an abstract?

Pages 216=217.

1. What is an adverse title?

Page 218.

1. When will an adverse title be made valid by lapse of time?

Pages 219=220.

1. When should bankruptcy proceedings be shown in an abstract?

Pages 221=222.

1. When and how should agreements for conveyance be shown?

Pages 223-224.

1. When and how should leases be shown?

Pages 225-228.

1. What other evidences of title should be shown in an abstract?

Pages 229-230.

1. What title should be shown in an abstract?

Pages 231-232.

1. What is a flaw in a title?

Page 233.

1. What is a cloud upon a title?

Pages 234-235.

1. What are inquiries in pais?

Pages 236-238.

1. What should be contained in an opinion of title?

Pages 239-240.

1. When is an attorney liable for an erroneous opinion?

QUESTIONS.

MINING LAW.

Page 247.

1. Define a mine.
2. Define minerals.
3. Discuss the relation existing between mining law and the law of real property.

Page 248.

1. Compare the civil law rule and the common law rule as to the ownership of mines.

Pages 249-250.

1. What were "Royal Mines"?

Pages 251-252.

1. What are the sources of mining law in this country?

CHAPTER II.

Pages 253-254.

1. Give a synopsis of the provision of the Federal Statutes relative to the securing of mining claims.

Pages 255-257.

1. What are rules of mining districts and what force have they?

CHAPTER III.

Page 259.

1. What mineral lands are open to location by citizens of the United States?

Pages 260-261.

1. What public lands cannot be located on?
-

CHAPTER IV.**Page 263.**

1. Who may locate mining claims?

Page 264.

1. May claims be located by agents?
-

CHAPTER V.**Page 265.**

1. Define "lode".
2. Define a "vein".

Page 266.

1. What are the provisions of the Federal Statutes as to the location of a lode claim?

Page 267.

1. When is a vein or lode "in place"?

Page 268.

1. What "discovery" is necessary to serve as the basis for a location?

Page 269.

1. What is the extent of a locator's rights of possession and enjoyment?

Pages 270-271.

1. What is a tunnel claim?

Page 272.

1. What are placer claims?
2. How are they secured?

Pages 273-275.

1. How may coal land be acquired?
-

CHAPTER VI.**Page 277.**

1. What are the formal parts of a location?

Page 278.

1. What is the proper form of location notice?

Page 279.

1. How must the notice be recorded?
-

CHAPTER VII.**Page 281.**

1. What estate is secured by location?

Pages 282-283.

1. What are extra-lateral rights?

Page 284.

1. What rights are acquired under a defective location?

Page 285.

1. What are cross veins?
2. What are the respective rights of the parties in such cases?

Page 286.

1. How may a placer claim containing a lode be located?

CHAPTER VIII.

Page 287.

1. What is abandonment of a claim?

Pages 288-289.

1. What is the result of the failure to perform annual labor?

Page 290.

1. How may a tenant in common forfeit his claim to a co-owner?

Page 291.

1. What are the two kinds of re-location?
-

CHAPTER IX.

Pages 293-295.

1. How may a mining patent be secured?
-

CHAPTER X.

Pages 297-298.

1. What are the respective rights of the parties when the surface and mineral estates are severed?

APPENDIX A.

TO REAL PROPERTY.

(This Appendix is taken from the Appendix to Thomas' Edition of Coke's Institutes, Edition of 1836.)

THE FEUDAL SYSTEM.

It remains to say something of the revolutions of the feud in the jurisprudence of our own nation.

1. *ASTOTHE TIME WHEN IT WAS INTRODUCED.* Whether feuds prevailed in England, before the Norman conquest, has been the subject of much dispute. In 1607, an event happened, which occasioned the question to be discussed, with a profusion of learning. Several estates within the counties of Roscommon, Sligo, Mayo, and Galway, being unsettled as to their titles, king James the 1st, by commission, under the great seal, authorized certain commissioners, of whom Sir Henry Spelman was one, to make grants of these estates. In exercise of this authority, the commissioners made a grant of lands in Mayo to Lord Dillon. King Charles the 1st issued a commission, to inquire into defective titles: and orders were given, that all persons, who had any of the estates in question by letters patent from the crown, should produce the letters, or an enrollment of them, before the lord deputy and council. In pursuance of these orders, the letters patent to Lord Dillon were produced. It was found, that the letters were granted to them "to the Lord Dillon and his heirs, to hold by knight service, as of his majesty's castle of Dublin." It was admitted, that the commissioners had exceeded their commission, in reserving a *mean* tenure, to the prejudice of the crown, when they ought to have reserved, either an express tenure, by knight service, in capite, or not to have mentioned any tenure; in which case, the law would have implied a tenure in capite. The question, therefore, was, whether the deficiency of the tenure so far affected the grant, as wholly to destroy the legal effect of it; or, whether the letters patent might not be good, as to the land, and void only as to the tenure. The case was argued, several days, by counsel, on both sides, and was afterwards referred to the judges. They were required by the lord deputy and council, to consider of it, and to return their resolution. The judges disagreeing in opinion, it was thought necessary, for public satisfaction, to have it argued solemnly by them all. This was done, accordingly. Those who contended for the validity of the letters patent, urged, among other arguments, that tenures in capite were brought into England by the conquest, but, that grants were by the common law; and, being more ancient than tenures, must, of necessity, be distinct from the thing granted. From this, they inferred, that though the reservation were void, the grant itself might be good. In the course of their arguments, on this point, they observed,

that Sir Henry Spelman was mistaken, when, in his Glossary, under the word *Feudum*, he referred the original of feuds to the Norman conquest. This drew from him a reply. He published it under the title "Of the Original Tenure by Knight Service in England." In his work, he argues, with great learning and strength of argument, that tenures, such as they were granted, in the letters patent, by himself and the other commissioners, in Ireland, were not in use before the conquest. He distinguishes between what he calls the *servitia militaria* and the *servitutes militares*. He contends, that the grievances and servitudes of fiefs, as wardships, marriages, &c., which to that day, he says, were never known to other nations, governed by the feudal law, were introduced by the conqueror. But he seems to concede, that, in a general sense, military service and feuds, were known to the Saxons. In this middle opinion, he appears to be followed by two very great authorities, Lord Hale and Sir William Blackstone. Almost all writers, however, are agreed, that, in the reign of the conqueror, the feudal law was completely established. Upon the whole, the most probable conjecture appears to be, that evident traces of something similar to the feud, may be traced in the Saxon polity; that it was established, with its concomitant appendages of fruits and services, by the Norman barons, in the possessions, which were parcelled out among them, by the conqueror; and that, about the middle of his reign, it was formally and universally established by law. This universality of tenure, is, perhaps, peculiar to England. In other kingdoms, those parts of the lands, which were permitted to remain in the hands of the natives, and a considerable part of those, which the conquerors parcelled out among themselves, were not originally subject to tenure. In the earliest age, however, of the feudal law, some advantages attended tenure, and frequently occasioned the conversion of allodial into feudal property. But in the anarchy, which followed the removal of the Carlovingian dynasty, there was an end of all political government: so that almost all persons found it advantageous to enter into the feud. To effect this, they delivered up their lands sometimes to the sovereign, sometimes to some powerful lord, and sometimes to the church, on condition to receive it back in feudality. Lands thus delivered and returned, received the appellation of *feuda data et oblata*. Some portion of lands, however, still remained free. Of this the proportion differs in the countries on the continent. In some, the courts presume it to be feudal, till it is to be proved allodial. In others, the presumption is in favour of its allodality. See before 63, a. note 1. But with us, in the eye of the law, tenure is universal; that is, *dominium directum* of all the lands in the kingdom is in the crown; the *dominium utile* of them is in the tenant.

VI. *AS TO THE FRUITS AND INCIDENTS OF THE FEUDAL TENURE.* These, in the original simplicity of the feud, were reducible to two: on the part of the lord, to the obligation of warranty, that is, to defend the title of his tenant against all others, and, when subinfeudation, was introduced to the further obligation of acquittal, that is, to keep the tenant free from molestation, in respect of the services due to the lords paramount: on the part of the tenant, to an obligation, of giving his lord his aid, that is, his military assistance, and services in defence of the feud. But this primitive simplicity of reciprocal obligation was soon destroyed. Different sorts of tenures were

established, and the fruits and incidents of them were multiplied. A detail of these does not seem to be required in this place; especially as a full and masterly account of them has been already given by Mr. Justice Blackstone.

VI. 3. The branches of feudal jurisprudence, which principally concern the tenures of Littleton and Sir Edward Coke's commentary, and which, therefore, may be thought such as at once call for and limit the present investigation, are those which relate to the inheritance and alienation of the feud.—With respect to the *INHERITANCE OF THE FEUD*, it may be observed, that, at the same time, that succession itself prevails in every civilized country, the principle, by which it is governed, and the order in which it proceeds, are, every where, different. The principle and order of the feudal succession, are peculiar to that system of polity. Nothing, perhaps, will show this in so strong a light, as bringing them into contrast with the doctrines of inheritance in the civil law. It has been already observed, that, in the Roman law, the distinction between real and personal property, except in the term of prescription, is seldom discoverable; but that in the feudal law, the legal incidents and qualities of the two kinds of property are entirely dissimilar. This is no where more striking, than in the article of inheritance. The Roman law of inheritance embraces both kinds of property, equally; the feudal law of inheritance, is, most strictly, confined to real property, and, (it was almost said,) turns with disdain, from all property of the personal kind. By the Roman law, the heir was a person instituted by the party himself, or in default of such institution, appointed by the law, to succeed both to his real and personal property, and to all his rights and obligations. In the feudal law, he is a person related in blood to the ancestor: and, in consequence of that relationship, entitled either, merely by act of law, or, by the concurrent effect of law and the charter of investiture, to succeed at the ancestor's decease, to his real or immoveable property, not given away from him by will. In the civil law, he was considered, as representing the person of the deceased; in consequence of that supposed representation, the law cast on him the property and rights of the deceased, and fixed on him all the deceased's charges and obligations. Thus, by a fiction of the law, the person of the ancestor, was continued in the heir, so that, in all religious, moral, and civil rights and obligations, the heir, in the language of the Roman lawyers, was *eadem persona cum defuncto*. In the feudal system, he succeeded to the real property, only, of the ancestor; and this, not under any supposed representation to him, or in consequence of any supposed continuation of his person, but as related to him in blood, and, in consequence of that relationship, as a person designated, by the original feudal contract, to succeed to the fief. By the civil law, every person was considered as capable of instituting an heir; where the party died, without instituting an heir, the law introduced a necessary heir. Hence, the distinction in that law, between the *heredes, sui necesarii nati*, and *facti*. In the feudal law, it was an acknowledged maxim, that God only can make an heir. Hence the opposite maxim of the feuds, *solus Deus potest facere heredem non homo*. By the Roman law, in consequence of the fiction, that the heir was the same person with the deceased, he was bound to acquit all the deceased's obligations, not only, so far as the property derived by him from his ancestor extended, but, in their utmost extent. The first indulgence granted the

heir, was, that, the pretor allowed him a certain time, in which, he might deliberate, whether he would accept the succession or not; at the expiration of which, he was obliged, either absolutely to accept, or absolutely to renounce, the inheritance. Justinian established still further in favour of the heir, a liberty of accepting the inheritance, with, what was termed, the benefit of an inventory, that is, a condition, that he should not be liable beyond the value of the property of the deceased. Nothing of this was known in the polity of the feudal association. In the intendment of that law, the heir, as it has been observed before, came under the original feudal contract: He claimed nothing as a gift from the ancestor: He derived all from the original donor: He could not therefore, be liable to any of the obligations of the ancestor. Another maxim of the Roman law was, that the representation of the heir to the ancestor, did not take effect, till he determined his election to accept the succession, by what was termed, an *additio hæreditatis*. In the feud, the law cast the right of heirship on the heir, immediately upon the ancestor's decease; and though, when the doctrine of alienation was introduced, the ancestor, by disposing of all his property, might render his right of heirship perfectly nugatory, so far as related to the property of which the ancestor died seized; yet, upon this account, he was not less the ancestor's heir. Thus, by the Roman law, as fixed by Justinian, it was at the party's option, whether he would, or would not, be invested with the character of heir. The feud left him no option: it forced the heritable quality on him; and the dead man, in the language of that law, gave seisin to the living, and forced on him the character of heir. Hence the maxim and expression of the feud, *le mort saisit le vif*. From the supposed representation in the Roman law, of the deceased, by the heir, it became a maxim of that law, that no person could die testate, as to part of his property, and intestate as to the other part. The consequence of this was, that, whoever succeeded as heir, whether he took the entirety, or a fractionary part only of the property of the testator, was held in consequence of that heirship, to continue the person of the ancestor. In the feudal law, after testamentary alienation was allowed, the contrary maxim ever prevailed; the party might die testate, as to one part of his property, and intestate as to the other. To sum up the contrast in a few words;—by the Roman law, the heir was a person appointed, indiscriminately, by the law, or the deceased, to represent him; and, in consequence of that representation, was entitled to his property, and bound by his obligations. In the feudal law, the heir was a person of the blood of the ancestor, appointed, by the original contract, to the succession, or, at least invested with a capacity of succession; and, in consequence of that succession, was supposed, more by the general notions of mankind, than by the notions of the feudal polity, to represent the ancestor. By the Roman law, the heir succeeded to the property of the ancestor, in consequence of his civil representation of him, and supposed continuation of his person: in the feudal law, he acquired a national representation to the ancestor, in consequence of the feudal succession. In the Roman law, real and personal property were equally the subject of inheritance:—in the feudal law, inheritance was confined to real property. The Roman heir claims, as such, all from the person last possessed, and nothing from the original donor: the feudal heir claims, as such, all from the donor, and nothing from the person last possessed.

VI. 4. The same difference prevailed in these laws, with respect to the *ORDER OF SUCCESSION*. By the Roman law, as it was finally settled by the Novels, on the decease of an intestate, the descendants, of whatever degree, were called to the succession, in exclusion of all other relations, whether ascendants or collaterals, and without regard to primogeniture, or preference to sex. Where the intestate left no descendants, such ascendants as were nearest in degree, male or female, paternal or maternal, succeeded to his estate, in exclusion of the remoter heirs, and without any regard to representation; but, with this exception, that, where the deceased left brothers and sisters, of the whole blood, besides ascendants, all succeeded in equal portions; *in capita*; and here, if, besides ascendants, the deceased left children of brothers or sisters of the whole blood, the children succeeded to their parent's share, by representation, *in stirpes*. Where the intestate left no descendants, and no ascendants, the law called the collaterals to the succession, giving a preference to the whole blood. By the law of the code, if no one was left in the descending, ascending, or collateral lines, the husband succeeded to the estate of the wife, and the wife to that of the husband. This was altered by the law of the Novels. In default of a legal heir, the estate became a *res caduca*, and the fiscus, or exchequer succeeded. Such appears to be the general outline of the Roman law, respecting successions. The feudal regulations respecting successions, differed from it, in almost every respect. Originally fiefs were granted to be held at the will of the donor, and were, therefore, resumable at his pleasure; then, they were granted for a year certain; then, for the life of the grantee; then, to such of the sons of the grantee, as the donor should appoint. Then, all the sons, and in default of sons, the grandsons were called to the succession of the fief; in the process of time, it was opened to the 4th, 5th, 6th, and 7th, generations, and afterwards to all the male descendants, claiming through males, of the first grantee; and, at last, was suffered to diverge, generally, to collaterals. But this, as to such collaterals as were not lineal heirs of the first donee, was effected through the medium of a fiction completely and peculiarly feudal. When a person took by descent, his brothers, though in the collateral line of relationship to him, were in the direct course of lineal descent from the ancestor. In proportion as the descent from the ancestor was removed, the number of persons thus claiming collaterally from the last, and lineally from the first, taker, was proportionably multiplied. In the course of time, the first taking ancestor was forgot, and then, it was presumed, that all who could claim collaterally from the person last in the seisin of the fee, were of the blood of the original donee. On this ground, in latter times, when, upon the grant of a fief, it was intended, that, on failure of lineal heirs, the fief should diverge to the collateral line, it was granted, to be held with the incidents and properties, with which the donee would have had it, had it vested in him by descent, in a line of transmission from a distant and forgotten ancestor: and, among them, that of transmissibility to collaterals.—This general heirship of fiefs, in the male line, was introduced, in France, soon after the succession of the Capetian line, and in Italy and Germany, during the period, in which the empire was possessed by the house of Franconia, and the earlier emperors of the house of Suabia. A similar progress in the descent of lands, may be traced in the

jurisprudence of our own country. The policy of most feudal countries, has shown some preference of the whole blood to the half blood, and a great unwillingness to admit females into the fief. In England, there has been a more rigid exclusion of half blood, and a less rigid exclusion of the female line, from the feudal succession, than is to be found in the law of almost any other country, governed by the feudal polity. To us also, it seems to be peculiar, to exclude the parent and all others in the ascending line, from the immediate succession to the fief. But, the most striking point of difference between the Roman and the feudal, course of succession, is, the prerogative allowed by the latter to primogeniture. To the eldest son, the Roman law showed no preference; wherever the feudal polity has been established, he has been allowed several important prerogatives. In England primogeniture obtained in military fiefs, as early as the reign of William the Conqueror, but with this qualification, that, where the father had several fiefs, the *primum patris feudum*, only belonged to the eldest son. In the reign of Henry the 2d, primogeniture prevailed absolutely in military fiefs, and in the reign of Henry the 3d, or soon afterwards, the same absolute right to the succession by primogeniture, obtained in socage lands. Thus, in all countries, where the feud has been established, a marked distinction in the order of succession, has, in direct opposition to every principle and practice of the Roman law, been shown to primogeniture. *Usu*, says Zoesius *ad omnia feuda serpsit, ut vel ex asse majori cedant, vel major præcipuum aliquod in iis habeant*. But, it is observable, that a total exclusion of the younger sons, is, perhaps, peculiar to England. In other countries, some portion of the fief, or some charge upon it, is in many cases, at least, secured by law, to the younger sons. In some places, this is secured to them for their lives only; in others, their descendants succeed to it. Still, the eldest son, in the eye of the law, represents the fee. In Spain, the patrimony is divided into fifteen shares. Three shares, that is, a fifth of the whole, are first subtracted; afterwards, four shares, or a third of the remaining twelve shares. This fifth and third, as they are called, are termed a *majoratus*, and are at the free disposition of the parents; the remaining shares are appropriated to the children. The *majoratus*, may be, and generally is, entailed upon the eldest son of the family, but a greater portion of the patrimony cannot be settled on him, without leave from the crown. The singular nature of this provision, has occasioned a particular mention of it by most feudal writers; it was therefore thought proper to notice it, in this place. Any further mention of the particular customs respecting primogeniture, appears unnecessary.

VI. 5. Another striking point of difference *between the Roman and the feudal polity*, with respect to real property, is the contrast between *THE ABSOLUTE DOMINION OVER THE INHERITANCE*, with which the Roman law invested the heir, and the numerous and intricate fetters, with which the feudal jurisprudence (of England particularly) has permitted it to be bound. The Roman law, (it has been already stated at some length,) permitted a person to appoint his heir, and invested him, on the testator's decease, with all his rights and obligations. Before Justinian introduced the benefit of the inventory, as the heir, by accepting the inheritance, subjected himself to all the testator's debts, the office was sometimes refused, as danger-

ous. This gave rise to the vulgar, the pupillar, and the quasi-pupillar substitution. The vulgar substitution was, where the testator appointed one to be his heir, and, if he refused, substituted another in his place. These conditional substitutions might be extended to any number of heirs. When they were made, the heirs instituted under them, were called, in succession, to accept or refuse, the inheritance. When once an heir accepted the inheritance, it vested in him, absolutely, and all the subsequent substitutions then entirely failed. The pupillar substitution was, where a father substituted an heir to his children, under his power of disposing of his own estate and theirs, in case the child refused to accept the inheritance, or died before the age of puberty. The quasi-pupillar substitution was, where the children past puberty, being unable, from some infirmity of mind or body, to make a testament for themselves, the father, in imitation of the pupillar substitution made a testament for them. In all these cases, it is evident the dominion over, and substance of, the inheritance were preserved entire and unqualified. In two instances, and in these only, the Roman law admitted an exception to their integrity. The first was, in the case of an usufruct; where a right was given to one person, to use and enjoy the profits of a thing belonging to another. The second was, the case of a *fidei commissum*, when the inheritance was disposed, in whole, or in part, to an heir, in trust, that he should dispose of it to another. But neither of these devises suspended the absolute vesting of the inheritance. An usufruct could not be extended beyond the life of the usufructuary. The *fidei commissarius* (the person beneficially interested in the inheritance), could compel from the *hæres fiduciarius* (the trustee), a transfer of the inheritance immediately on the accruer of his right. Thus the property and dominion of the inheritance absolutely vested in him in equity, with an immediate right to compel a legal transfer of it. In this manner, by the Roman law, the heir succeeded, in every case to the absolute property of the inheritance, and to all the rights and obligations of the ancestor. It should, however, be observed, that this account of the simplicity of the Roman law, with respect to the tenure, if it may be so called, of property, applies to it only, in the state of simplicity, in which it was placed, by the Trebellian and Pegasian decrees. In a further part of this annotation, we shall have occasion to mention the alteration occasioned by the introduction of fidei-commissary substitutions. These are to be considered, as a departure from the genuine spirit of the Roman law, in the doctrines respecting inheritances. See *Huberi Prælectiones ad Inst. lib. 2 tit. 23. § 18*. From that spirit, nothing could be more different, with respect to the tenure and modifications of property, than the regulations of the feudal law. According to these, the heir derived his title, no otherwise through his ancestor, than from the necessity of mentioning him in his pedigree. This enabled him to describe himself, as an object, to whom the succession was originally limited. Thus he was a nominee in the original grant; he took everything from the grantor, nothing from his ancestor. The consequence was that, while the absolute or ultimate ownership was supposed to reside in the lord, the ancestor and the heirs took equally as a succession of usufructuaries, each of whom, during his life, enjoyed the beneficial, but none of whom possessed, or could lawfully dispose of, the direct or absolute dominion of the property. Thus,

Vol. VI.—21.

while, by the Roman law, and the law of almost every other country, property is vested in the possessor solely and absolutely, every species of feudal property is necessarily subject to the three distinct and clashing, though concurrent, rights of the lord, the tenant and the heir. It follows, that, by the original principles of the feudal law, *fiefs could neither be aliened* nor charged with debts, and in direct contradiction to almost every other system of law, the feudal system of polity made land unalienable, and absolutely took it out of commerce.

VI. 6. *THE VARIOUS MODES WHICH HAVE BEEN USED, IN THE COUNTRIES WHERE THE FEUD HAS BEEN ESTABLISHED TO ELUDE, OR OVERTHROW, THE RESTRAINTS UPON ALIENATION*, form one of the most important parts of feudal learning. The mode, by which this has been effected in England, is peculiar to itself. It has been the principal occasion of the striking difference, to be observed, in the feudal jurisprudence of England, and that of other countries. One artifice to elude the feudal restraint upon alienation, seems to have been resorted to, by every nation where the feudal policy has been established—that of *subinfeudation*. Its effect in aggrandizing the vassals, and rendering them independent of the throne, has been already noticed. It also served as an indirect mode of transferring the fief. It was inhibited in England, to all but the King's vassals, by the statute *quia emptores terrarum*, 18 Edward 1st; and this inhibition was extended to the King's vassals, by the statute *de prerogativa regis*, 17 Edw. 2. c. 6. In most other countries, it is still allowed, under some restrictions. The chief of these are, 1st. That it must be a real subinfeudation, and not a sale, or other transaction, under the appearance or colour of a subinfeudation; 2d. That the sub-vassal must be of equal, or at least, of suitable rank and circumstances. And, 3dly. The conditions, so far as the lord is interested in them, must be the same, as those upon which the original investiture is granted. In other respects, the feudal history of alienation has varied. As it now stands, in almost every country, the lord's consent must be had. But in some, it still continues a matter of favour, in others, it is a matter of right, to which the tenant is always entitled, on paying certain fines to the lord. The principal of these are the *quint* and the *lods et ventes*. These the lord claims on every sale. In other cases, where the fief is transferred from one to another, the lord claims the *relevium* or *droit de rachat*, which, generally, is one year's produce of the fief. In many countries, where the tenant sells his fief, the lord has a *jus retractus*, or *retrait feodal*, by which, he has a right to become, himself, the purchaser of the fief, on reimbursing the stranger the price paid by him, for the purchase of it, and the costs attending the purchase. In many countries, also, the right of the heir is consulted by giving him the *retrait lignager*, by which, when a fief is sold, a relation of the vendor, within a certain degree of parentage, may entitle himself to repurchase the fief by an offer of the purchase money, interest, costs, and expenses, or as it is termed in the writ, *offre de bourse, deniers, loyaux courts a parfaire*. Such is the general history of alienation in foreign countries. The history of alienation in England is very different. A liberty of alienating lands of purchase, at least where the party had no son, is allowed by a law of Henry the 1st, and expressly recog-

nized by a law of Henry the 2d. Some time afterwards, it obtained generally, with little or no limitation. The indirect mode of aliening, through the medium of subinfeudation, the restraint of it by *magna charta*, and its total abolition by the statutes *quia emptores*, and *de prerogativa regis*, have been already noticed.

VI. 7. But while the restraints upon alienation, so far as it was contrary to the general principles of the feudal tenure, were thus gradually removed, the policy and private views of individuals, found means to impose new restraints upon it. This was done by the introduction of conditional fees at the common law, and afterwards by the *INTRODUCTION OF ENTAILS*. We shall consider this species of limitation of property, with a view to the different modes of it, which have been admitted by the Roman law, and by the laws of France, Spain, Germany, Scotland, and England. With respect to the *Roman law*, we have already had occasion to notice its simplicity, in the inheritance of property, as it was settled by the Trebellian and Pegasian decrees, and its alteration, in this respect, by the introduction of the fidei-commissa. These gave rise to successive fidei-commissary substitutions. By multiplying these, and by prohibiting each substitute from aliening the inheritance, property was absolutely taken out of commerce, and fixed, in a settled, and invariable course of devolution, in particular families. There is reason to suppose this mode of settling property was never common, and the policy of Justinian soon interfered to check it. By the 159th Novel, he restrained fidei-commissary substitutions to four degrees, including the party himself, who instituted the substitution. With the third substitute, therefore, the power of the testator expired, the absolute dominion vesting absolutely in him. This, in some measure, restored the law to its primitive simplicity. A similar progress is discoverable in the history of *French Jurisprudence* respecting Substitutions. The law of France appears to have generally admitted perpetual substitutions. The ordinance of Orleans, in 1560, restrained them to two degrees, exclusive of the instituant. That ordinance not having a retrospective operation, and the inconvenience arising from prior substitutions being greatly felt, the ordinance of Moulins, in 1566, restrained all substitutions, anterior to the ordinance of Orleans, to the fourth degree of the instituant. The ordinance of 1747, fixed the law on this important branch of real property. It was framed with great deliberation by the Chancellor d'Aguesseau, after taking the sentiments of every Parliament in the kingdom, upon forty-five different questions proposed to them on the subject. These questions, and the answers of the parliaments, have been published under the title *Questions concernment les Substitutions*, Toulouse, 1770. The ordinance of 1747 confined substitutions, with some exceptions, to two degrees, and directed the degrees to be computed, by the individuals, in whom the substitution vested. Upon this, it was held, that if the testator appointed several persons jointly, to the inheritance, they formed, together, but one degree; if he appointed to it several persons successively, though in the same degree of kindred, as brothers or sisters, each person in whom the succession vested, formed one degree. The mode of settlement used in *Spain*, by what is termed a *Majoratus*, has been already noticed. In *Germany*, the restraints imposed

by the feudal law, on the alienation of property confined by the original investiture, to a particular channel of descent, still prevail; so that the same intricate entails subsist with them, as with us; without those modes of eluding them which the laws of England have sanctioned. *The tailzies or entails of Scotland* appear still more intricate. The least restrictive of these is called a Simple Destination. It is defeasible and attachable by creditors, so that it amounts to no more than a designation who is to succeed to the estate, in case the temporary possessor neither disposes of it, nor charges it. The next degree of tailzie, is a tailzie with prohibitory clauses. The proprietor of an estate of this nature cannot convey it gratuitously, but he may dispose of it for onerous causes, and it may be attached by creditors. The substitutes, however, as creditors by virtue of the prohibitory clause, may by a process in Scotland, termed an inhibition, secure themselves against future debts or contracts. The third and strictest degree of tailzie, is a tailzie guarded with irritant and resolute clauses. This is a complete bar to every species of alienation, voluntary or involuntary. The efficacy of these clauses, both against the heir, and the creditors of the tenant in tail, aliening, was established in 1662, by a solemn decision of the judges of Scotland, in the case of the Viscount Stormont against the creditors of the Earl of Anandale; and that decision was sanctioned by a statute of the Scottish Parliament in 1685. This mode of entail appears to be greatly discouraged by the judicature of the country; and modes of eluding it have been discovered, and allowed in their courts of justice. With respect to *English entails*, we have taken notice of the maxim of the Roman law, that no man can name an heir to succeed to his heir; and, of the opposite maxim of our law, that God only can make an heir, not man. The latter maxim was understood, with this qualification, that, though the party could not introduce a person into the heirship of the fief, who was not originally capable of inheriting the fief, by being of the blood of the donee, still he might give a preference to a particular class of persons, falling within that description, and might exclude others. Thus, in England, according to Sir William Blackstone (lib. 2, c. 7, s. 2), as in all other countries, where fiefs have prevailed, they might originally be limited to the male, either in preference to, or in utter exclusion of, the female descendants of the party. In the same manner, they might be limited to a male and his descendants, by a particular wife, or to a female and her descendants, by a particular husband, or to both the parents and the heirs of both their bodies. These, at the common law, were all termed *Estates in fee-simple conditional*. The condition, from which these estates took their appellation, did not prevent the fee from vesting in the donee, immediately upon the gift; it only authorized the donor to re-enter, if the party had not issue, or, if having issue, the issue afterwards failed, and neither the donor nor the issue aliened. Upon this principle, it was considered to suspend the power of absolute alienation, till the birth of issue. But upon the birth of issue, the party had the same power of alienation over the conditional fee, as he had over an absolute fee. The statute *de donis conditionalibus* took away this power. It did not, however, affect the estate of the donee, in any other respect. In consequence of this was, that a tenant in tail was as much seized of the inheritance, after the statute *de donis*, as a tenant in fee

simple conditional, was before it. Thus, therefore, an estate of inheritance remained in the donee; but, a particular description of heirs only being entitled to take under it, it received the appellation of an *estate tail*, that is, an estate docked, cut off, or abridged, in contradistinction from the estate in fee simple absolute. Thus, the fee was preserved to the issue, while there was issue to take it, and was preserved to the donor, when the issue failed. This reversionary right of the donor was soon found to be susceptible of the same modifications, as a present estate, and, therefore, limitations, either of the whole reversion, or of partial estates out of it, were made to strangers. It frequently happened, that, after a limitation to one series of heirs, another series of heirs was substituted, to take the fief, on the failure of the first series. The first person then, to whom this subsequent series was limited, was made the stock, or *terminus*, of this subsequent line of inheritance. In these cases, the substitute did not take in quality of heir to the last taker, but as a new purchaser under the original donor. Thus, in direct opposition to every genuine principle of the Roman law, endless substitutions were introduced, not only of individuals, but of whole lines of descendants, and the estate being thus unalienably preserved to the issue, there was still a more pointed opposition, to the maxim of the Roman law, that the heir necessarily succeeded to the obligations of the deceased.

VI. 8. These new restraints upon property were never favorably received, and various *ARTIFICES WERE USED TO ELUDE THEM*. One of these was carried into execution, through the medium of a *discontinuance*. It has been observed, that, though the statute *de donis* took away the power of lawful alienation, it did not suspend the vesting of the fee. The alienation, therefore, of the donee tenant in tail, was no forfeiture; and the alienee, as he took his conveyance from a person seized of the fee, was considered as coming in, under a lawful transfer of the inheritance. Now, it was an established rule of law, that, whenever any person acquired a presumptive right of possession, his possession was not to be defeated by entry. The consequence of this was, that in these cases, the alienation was unimpeachable during the life of the alienor, and, after his decease, the heir could not assert his title by the summary process of entry, but was driven to the expensive and dilatory process of a formedon; this was termed a discontinuance. The expense and delay attending a formedon frequently prevented the tenant in tail from resorting to it, to assert his right. In the course of time the period for asserting it elapsed, and thus, therefore, virtually, the discontinuance proved a bar to the entail. Another mode of eluding estates tail was, by *warranty*. When lands were conveyed from one to another, the grantor, for the greater security of the grantee, usually warranted, that is, entered into a covenant to defend the possession to the grantee, and, in case of eviction, to make him a recompense. This obligation of the ancestor was considered to be a covenant real, and therefore, on his decease, descended on the heir. Thus, it frequently happened, that on the death of the ancestor, his contract of warranty descended on the person, who would, otherwise, be entitled, as his heir, to the lands warranted, so that the obligation of warranty, and the right to the lands warranted, met in the same person. The consequence of this was, that, as heir in tail, he was entitled to the lands; as heir

general, he was bound to defend the title of his ancestor's alienee; thus, if, on the one hand, he was entitled to recover the lands, the alienee was entitled on the other, to recover an equivalent recompense from him. To prevent this circuitry, it was held, that the obligation to warranty, precluded him from claiming the lands warranted. Against this, in some cases, the statute *de donis* provided. The general doctrine was, that where the heir claimed, as heir, the lands warranted, he was bound by the warranty, in those cases only, where he inherited, from the ancestor, fee simple lands of equal value; but, where he claimed as purchaser, he was bound by the warranty, though no such lands descended upon him. This is the meaning of the maxim, that warranty, when lineal, is a bar with assets; and when collateral, is a bar without assets, to the right of the tenant in tail, on whom it devolved. By these artifices, the force of entails was eluded. In the progress of time, methods were discovered, by which the law allowed them to be absolutely destroyed. The first of these has received the name of a *common recovery*. In the language of the courts, a recovery is the effect of a sentence, in a solemn judgment, whereby the party is restored to a former right. In the particular language of our courts, when applied to judgments in adversary actions, it is the effect of a sentence, by which, in a suit instituted for the recovery of an estate claimed by the party, judgment is given him, that he shall recover it, according to his claim. In a suit of this nature, when really adversary, the judgment, whether given after defence, or upon default, equally bound the right to the land. Of this, tenants in tail availed themselves, to deliver their estates from the entails to which they were subject. They permitted the entailed lands to be recovered against them, on a fictitious process, but, with a secret confidence, reposed in the recoveror, that, after the recovery was completed, he should reconvey the lands to the party in fee simple; and in the mean time, permit him to take the profits of them. Another mode, by which the destruction of entails was allowed to be effected, was the application of the legal operation of *fin*es. In the notion of our courts, a fine is a compromise, with the leave, and under the sanction of the court, of a real action, for the recovery of land. It is common to all courts of justice, to permit suits commenced in them, to be compromised, and to give their sanction to the compromise. In the civil law, and in the feudal law of other countries, this species of compromise is termed a transaction. The process itself, therefore, we have in common with them. But, it is peculiar to our law, to use it as a mode of eluding the restraints imposed by the law of the land on the alienation of real property. A writ is brought against the tenant in tail, by which the party suing out the writ, demands the lands, against the tenant, on his supposed previous agreement or covenant, to convey the land to him. The tenant is understood to be satisfied with the justice of the claim, and therefore applies for the license of the court, to make the matter up. This is granted. The parties thereupon enter into a concord or agreement. By this, the tenant acknowledges the lands to be the right of the demandant. This acknowledgment, being made with the leave, and under the sanction, and entered on the records of the court, had the effect of a judgment. Of this process, tenants in tail availed themselves, to bar their estates tail, in the same manner they did of judgments: they procured a fictitious suit to be instituted against them, and settled it, by a fictitious

compromise, in which they acknowledge the right to be in the demandant; with the same secret confidence reposed in him, that he should hold the estate in trust for them, and convey it according to their directions. Thus, through the medium of a collusive suit and judgment, which are now called a common recovery, in one instance, and of a collusive suit and compromise, which are now called a fine, in the other, entails were totally defeated. It is unnecessary, here, to trace the steps by which this has been effected. Common recoveries were originally a deceit upon courts of justice. When the sanction of the courts was first given them, it was done indirectly, with great caution, and some degree of artifice. It was not till the reign of Edward the 4th, that they obtained the unequivocal sanction of a solemn decision of a court: and it was a much later period, before their effects were recognized by the legislature of the country. The introduction of fines was effected in a much bolder manner. The statute *de donis* had said fines should be null; the statute of the 4 of Henry 7, or at least that of the 32 of Henry 8, said they should be valid. The different effects of a fine and a recovery do not fall within this inquiry. (Mr. Cruise's valuable treatises upon them are well known.) It seems sufficient to observe, generally, that a fine is binding on the issue in tail only; a recovery is binding both on the issue and those claiming in reversion or remainder. A still more summary and easy opening of entails has been granted by the legislature, in favour of the crown, by 33 Hen. 8, c. 39, in favour of the creditors of traders, by the 21 Jac. 1, c. 19, whereby the commissioners are authorized to sell the bankrupt's entailed lands; in favour of general creditors, by the acts for the relief of insolvent debtors; and in favour of charitable donations, by the 43 Eliz. c. 4.

VI. 9. The alienation hitherto spoken of, except that referred to in the last observation, has been confined to cases where it is the act of the party himself; and is, therefore, termed voluntary alienation. But in many cases, it is produced by the act of law against the party's own will. In these cases, it is termed *INVOLUNTARY ALIENATION*. Here its effects must be considered, with respect to the party himself, his heir, and the special prerogative of the king. In every instance the genius of the feud appears. *With respect to the party himself*, the tendency of the feud to secure to the lord the services of the tenant, and to take landed property from commerce, has been noticed. It was a consequence of those principles, that the party was not at liberty to subject either himself, or his lands, to the payment of his debts. When, therefore, at the common law, a person sued a recognizance, or judgment for debt, or damages, he could neither take the body, nor the lands of the debtor, except in some special instances, into execution. He could only take in execution his goods and chattels, and the profits of his lands. For those the law gave him the *feri facias*, by which the sheriff was commanded to cause the sum, or debt recovered, to be made out of the goods and chattels of the debtor; and the *levaria facias*, by which the sheriff was ordered to seize the debtor's goods, and receive the rents and profits of his lands, till the creditor was satisfied. Thus, at the common law, neither the person nor the lands of the debtor could be attached for debt. But, by the 25th of Edw. 3d. c. 17, the body of the debtor was made liable, by a writ of *capias ad satisfaciendum*, to imprisonment, till the debt was satisfied; and the

statute of Westminster 2. 13th Edw. 1st. ch. 18, granted the writ of *elegit*, by which the defendant's goods and chattels are delivered, to the creditor, at an appraised value; and if these are not sufficient, then the moiety or one-half of the freehold lands of the debtor, are delivered to the creditor, to be retained till the debt is levied, or the debtor's interest in the land is expired. Afterwards, under the statute *de mercatoribus*, 13 Edw. 1, the merchant might cause his debtor to appear before the mayor of London, or any of the other persons mentioned in the act, and there acknowledge his debt. This was called a recognizance. If the debt was not paid at the time appointed, the recognizance was held to be forfeited, and the body, lands and goods of the debtor, were to be delivered to the merchant creditor, in execution, to compel payment of the debt. The process by which this was done, was called an *extent*, because the sheriff was to cause them to be appraised, to their full or extended value, before he delivered them to the creditor. By the statute of the 27th Edw. 3. c. 9. a similar process for the recovery of debts was provided for those, whose debts were acknowledged before the mayor of any of the towns, where the staple was held. These securities are generally known by the short appellation of statutes merchant and statutes staple. From their nature, they were, at first, appropriated to the commercial part of the community. By the 23d Hen. 8. a similar security, by a recognizance in the nature of a statute staple, was extended to the community at large. The laws, respecting bankrupts, seem now, to have made landed property of merchants and other tradesmen, generally subject to their debts. The statutes respecting fraudulent conveyances and devices have proceeded, some way, towards making lands generally liable. It may not be improper to close this account of involuntary alienation by an account of involuntary alienation in the Roman law, as it is succinctly stated in the Digest, lib. 42, tit. 1. *Primo quidem res mobiles animales pignori capi jumentur, mox distrahi; quarum pretium, si suffecerit, bene est; si non suffecerit, estiam soli pignora capi jumentur et distrahi. Quod si nulla moventia sint, a pignoribus soli initium faciunt. Quod si nec quæ soli sunt, sufficient, vel nulla sint soli pignora, tunc pervenietur etiam ad jura. Si pignora quæ capta sunt, emptorem non inveniant, rescriptum est ut addicantur ipsi cui quis condemnatus est. Addicantur autem ea quantitate qua debetur.*

With respect to the heir,—it has been observed, as one of the most striking peculiarities of the feudal system, that the heir claimed nothing from the ancestor, but came in under the original feudal contract. The consequence was, that, originally, though on the decease of the debtor, the executor was answerable, as far as he had assets, the heir was not answerable in respect of the lands descended. But after the free alienation of land was allowed, the attachment of it, in the hands of the heir, for the debt of his ancestor, followed as a necessary consequence. But, here again, the principle of the feudal law introduced a distinction, which, with some qualifications, prevails at this day; that, the assets in the hands of the executor, are liable generally to the ancestor's debts of every kind, but the assets in the hands of the heir, are liable only to debts of record, and debts by specialty, in which the heir is named; to the former, in respect of the lien, which the process of the court created, on the lands themselves; to the latter, on the supposition, that the

heir was comprehended in the original contract. For the ancestor's debts by simple contract, in opposition to the Roman law, and to the most obvious principles of natural justice, the heir still remains not liable. As to involuntary alienation, *in respect to the king*, it has been observed, that, in the case of a common person, the body of the debtor was not liable to execution; but, in the case of the king, it was different; for, at the common law, the body of the king's debtor is generally supposed to have been always liable to execution. Yet it seems singular, that, when the statute of *magna charta* restrained the king from seizing a man's land for debt, it should leave him at liberty to seize his person. In the course of time, however, it is certain that the body of the debtor might be seized, and that, after the law made it liable for the debts of the subject, the king had these special prerogatives, that he could protect his debtor against the suits of his other creditors; and that, at the common law, he had a right to the custody of his debtor's person, in another prison, at the suit of the subject. By the common law also, all the goods and chattels of the king's debtor might be sold for the payment of his debts. But the most important of the prerogatives of the crown, at the common law was, that, in the king's case, execution issued, not only against the goods and chattels, but against the lands of the debtor. Another important prerogative was, in the case of rent, for which the king might distrain on any of the lands of the debtor. He had other important prerogatives, with respect to priority and preference in execution, and satisfaction of his debts, a minute investigation of which does not fall within the subject of this discussion. These extensive prerogatives have been considerably increased by the statute law of the realm. By the 33d Henry 8. c. 39. all obligations made to the king, are to have the same force, and to be attended with the same remedies, to recover them, as a statute staple. By the 13 Eliz. c. 4. the lands of treasurers, receivers, and other accountants to the crown, were made liable to execution for debts to the crown, in the same manner as if the party had acknowledged a recognizance, under the statute of Henry 8. A doubt arose upon this statute, whether a sale might be made under it, after the death of the accountant or debtor. To remedy this, the explanatory statute of the 27th Eliz. c. 3. was passed, by which a power of sale, after the death of the debtor, was expressly given. Afterwards by an act made in the 39th year of Queen Elizabeth, this explanatory act was repealed, and a new exposition was made of the statute of the 13th Eliz. with various new provisions. But the act of the 39th Eliz. being only temporary, and having expired early in the reign of James the 1st, the explanatory act of the 27th of Eliz. was revived; but it fell into disuse, and when it came to be examined, on occasion of the late exertions made for the recovery of the crown debts, it was found defective. This gave rise to the act of the 25th of his present majesty, c. 35. by which the court of exchequer is authorized, on the application of his majesty's attorney general, in a summary way, by motion, to order the estates of crown debtors, which should be extended by any writ of extent, or *diem clausit extremum*, to be sold for the payment of the debts. Thus the law appears to stand at present, on the involuntary alienation of land, with respect to the debts due to the crown.

VI. 10. As to *TESTAMENTARY ALIENATION*; the influence of feudal principles, on this branch of alienation, is still strongly felt. It

has been observed, that by the Roman law, a will was an appointment of an heir; and he was considered, at the death of the testator, as universal successor to all the property, rights, and obligations of the deceased. Testamentary alienation, like every other alienation, was prohibited by the genius and law of the feuds. By what steps it prevailed here, is so happily and so concisely explained, in a note of the present Editor's most learned predecessor in this work, (note 1 to page 111 b.) as to render any deduction of it unnecessary in this place. To a perusal of that note, the reader is therefore invited. It remains to observe, that after the testamentary power over land was introduced, *a devise of lands* was not considered to operate as an appointment of a party to be a general heir of the testator, as in the Roman law; but *was considered to operate as a legal conveyance of the lands themselves*. See Lord Mansfield's argument in *Hogan v. Jackson*, Cowp., 299. In consequence of this, many of the requisites to other legal instruments are requisite in wills. Thus, as to the efficacy of a deed, for the transfer of real property, it is necessary that the grantor should have the seisin of the lands conveyed; so, to the efficacy of a will, it is necessary that, at the time of making his will, the deviser should have the seisin of the lands devised, or at least that kind of inchoate seisin or title, which is conferred by a contingent remainder. The consequence of which is, that while a Roman will operates on all the property of the deceased, without any regard or distinction, as to property acquired by the testator, before or after, the making of his will; by the law of England, a will cannot operate on any freehold lands, of which, at the time of making of the will, the party has not this species of seisin. Another consequence of the notion, that, a will affecting lands, is merely a species of conveyance, is, that, as by the law of England, a fee simple cannot be created without words of inheritance in the original donation or grant, so by the same law, *words of inheritance are equally necessary to the creation of a fee by will*. The only difference is, that certain technical words are required by law, to the creation of an estate in fee, by deed; but in wills, they may be dispensed with, and supplied, by any words, sufficiently denoting the intention of the testator. Here the subject appears to draw to a conclusion.

VI. 11. The reader has been presented with some of the most striking circumstances in the history and principles of the feudal law, particularly so far as they affect the landed property of this country. It remains only to state some of the most striking circumstances, *IN THE GENERAL HISTORY OF ITS DECLINE*. It has been shown, that the peculiar ingredient of the feud was, the connection between, and the reciprocal obligations of, the lord, and the tenant. Whatever interrupted or relaxed this connection and reciprocity of obligation, had a direct tendency to overturn the feud.

One of the earliest circumstances of this tendency was, the *general introduction of the practice of subinfeudation*. This, however salutary, in a general view, loosened the tie, which united the feudal association, by preventing the chain of dependence and subordination, consequent to the practice of subinfeudation; and which, it is evident from the general principles of the feudal law, and the history of other nations, operated in the strongest manner to cement and perpetuate the feud.

Another circumstance of the same tendency, was, the *introduction of the tenure of escuage*. This enabled the tenants by knights service to send persons to serve in the King's armies in their stead, and in process of time to make a pecuniary satisfaction to the lord, in lieu of it. This substitution of money, for personal attendance, was diametrically opposite to every feudal principle. Accordingly all writers have considered it, as a degeneracy of the tenure of knight service. A further circumstance of the tendency we are speaking of, was, *the prevalence of the socage tenure*. It is probable, that the number of these tenures was not great, till a considerable time after the Norman conquest; and perhaps the increase of them was not rapid, till some time after the introduction of escuage. From a comparative view of the different natures of the military and socage tenures, it is easily seen, how much stronger the feudal connection was under the former, than it was under the latter. The tenure in burgage was a species of socage tenure. Under this, chiefly, the commercial part of the community classed themselves. Nothing could be more opposite to the nature of the feudal tenure, than the wealth, the independence, and the peaceful habits of life, which usually attended the pursuits of commerce. Thus, as the general tenure of socage prevailed, the connection between the lord and the tenant proportionately relaxed.

But one of the most important circumstances, in the history of the decline of the feud, is, the *introduction of uses*. By these the legal estate of the land was in the feoffee. In fact, therefore, there never was a vacancy in the tenure. But the ownership and beneficial property of the land being absolutely vested in the *cestui que use*, there was no point of connection between him and the lord. Besides, when a feoffment was made to uses, it seldom happened, that the feoffment was made to a single person. The feoffees were numerous, and when their number was reduced to that of one or two persons, a new feoffment was made to other feoffees, to the subsisting uses. In the meantime, the ownership of the land was transmitted and aliened, at the will of the *cestui que use*. It is evident that, while the fief was held in this manner, there was a wide separation between the lord and the tenant. It must also be observed, that, where there was a feoffment to uses, the fruits of tenure incident to purchase, became seldom due, and those incident to descent almost never accrued to the lord. Now, where a person took by purchase, the lord was only entitled to the trifling acknowledgment of relief; when he came in by descent, the lord was entitled to the grand fruits of military tenure, wardship, and marriage. From these observations, it is clear, how great a fraud was practiced upon the lord, by the introduction of uses. A fief thus circumstanced, presented an apparent tenant to the lord, but it was almost barren of every fruit and advantage of tenure, and the land itself was entirely subtracted from the feud. Hence, we find, that, among the mischiefs recited in the preamble to the statute of uses, the loss to the lord, of the fruits of tenure, is particularly insisted on. It does not fall within the nature of these observations, to mention the steps which were taken to extirpate uses. One of them was the statute of the 1 Richard the 2d. cap. 9, which gave an action to the disseisee, both against the feoffee, and the *cestui que use*. It is observable, that the *senatus con-*

sultum Trebonianum, gave the same right of action against the *hæres fidei commissarius*. Unquestionably the object of the statute of the 27 of Henry 8, was to effect a total extirpation of uses.

APPENDIX B.

TO REAL PROPERTY.

LAND REGISTRATION UNDER THE TORRENS LAWS.

(By JACOB M. SHERBAHN.)

Among the most important principles of the law of real property, there is none of greater moment than the one which encourages the repose of titles. Since by the passing of the old Feudal tenures, land became free as it were, the need of laws to safeguard and secure stability of titles became more apparent as time passed. Under the Feudal System, where the use of land was given as a reward for service and where by the rule of primogeniture such use descended to the oldest son, the question of title was of little or no importance. In those days, estates in land, in general, were limited by two fixed rules, namely: 1st. The oldest son succeeded to the use of the land upon the death of his father. 2nd. The fee thereto remained perpetual in the King.

With the passing of Feudalism came the dawn of greater liberties and the acquisition of new rights. Important among such rights were those in relation to land. The interest of the tenant which was formerly confined to the *use* of the land only, was in due time broadened into a *fee*. Being thus clothed with the largest possible interest in land, the owner as a matter of course could do with the same whatever might be to his liking. Thus, land soon became the subject of bargain and sale, and as the ownership of land conferred a certain degree of social distinction, the title of "Landlord" or its equivalent, was eagerly sought by many of those possessed of sufficient means. With the advent of free titles came the growing necessity of some means whereby the owners of realty could maintain their possession against the adverse claims of others. This was a question of no small importance. The new system of tenures was confronted with new conditions which of necessity had to be met by new rules of action or the enactment of such laws as would preserve title in the rightful owner.

In former times the landlord went into actual possession, and his ability to retain such possession usually depended upon the force he could display in opposition to him who sought to oust him. Thus it may be said that possession coupled with sufficient force to retain the same were the first evidences of ownership or title. People had not yet learned the value of legal protection. To submit disputed titles for settlement in accordance with rules sanctioned by society, had not yet entered their minds. The necessity of some kind of evidence in support of the owner's title gradually became apparent. The formulation of the best rules of evidence in this respect came about slowly. In fact there was at one time, as in France for instance, a total lack of evidence of any kind required in the sale of land. The seller simply agreed orally to sell, and the buyer agreed to purchase and the passing of the consider-

ation from the vendee to the vendor completed the transaction. Strange and crude as such a method would seem at present, it was nevertheless regarded by the French people at least, as the acme of perfection. They boastfully asserted that the word of a Frenchman was beyond question. To be able to make conveyance by simple agreements and without recourse to public or private authority was to them a source of pride and joy. While such a system might be ideal in some respects, it lacked the necessary elements of protection against fraud or error. With no evidence accompanying a conveyance of land, the title must of necessity remain in a precarious condition. To establish proper rules of evidence in support of titles has been the aim in the customs and laws of most civilized countries. The former practice, in England, of livery of seizin, whereby the vendor in the presence of living witnesses put the vendee in possession by delivering to him a part of the land, such as a stone, a piece of turf, moss or a twig, was an effort to secure to the vendee peaceable possession and the right to exercise over the land exclusive control and ownership. This custom, like the previous one mentioned, was weak on the side of the sufficiency of evidence to forever support the title. The witnesses to the transaction would sooner or later die. In numerous instances they would migrate to distant parts of the realm or to foreign lands so that in the event of a contested title the witnesses were frequently dead or could not be procured by reason of remote or obscure places of habitation.

While various methods of transfer were in vogue in the several countries of Europe in early times, it should not be inferred that written conveyances had no place in those days. In England, it is true, deeds of sale in writing succeeded the ancient livery of seizin, yet in Rome as far back as the Roman Empire, deeds in writing were executed with great formality, and the required witnesses were so numerous that the risk of ejectment was reduced to a minimum. The custom of reducing to writing deeds of sale of land eventually superseded all other methods and grew into universal favor with all enlightened nations and so continues to this day. To require by law that all conveyances should be in writing and accompanied by certain prescribed formalities is a marked advance toward securing a certain degree of proof in support of titles. It soon became apparent that transfers in writing, even though executed with precise technicality, and in accordance with prescribed rules, were yet lacking in some important particulars. The written instruments in themselves were not at fault. They were in fact executed with the greatest skill and the most painstaking care was exercised in the drafting of each detail. Title was conveyed with an absolute degree of certainty. The delivery of the deed to the vendee became the symbolic delivery of the land and had the same effect as the former livery of seizin. Unless however, the vendor thereupon surrendered his possession, and unless the vendee at once took actual possession, his deed was ineffectual so far as protecting him from fraud or error was concerned. Should the vendee not enter into possession immediately, the vendor was not hindered from making a second conveyance. The doorway to fraud was yet wide open. The deed, though perfection in itself, fell far short of accomplishing the desired end. The primary defect in this method was the lack of publicity. Conveyances were regarded as private transactions and thus a degree of almost absolute secrecy was thrown around them. Under such condi-

tions there could be only one logical result, and that was the prevailing uncertainty of titles.

To provide what was thought to be a final remedy for the removal of this barrier of uncertainty, various recording laws were enacted imposing upon the recipient of a conveyance the duty of having the same made a matter of public record. This is accomplished usually by filing it with some public officer authorized by law for that purpose. By these same recording laws certain legal effect was given to all *bona fide* instruments thus publicly filed. The first effect was designed to secure ownership. Another object was to secure priority of liens among creditors where land was made the basis of credit. Secret titles were now no longer recognized and secret liens were abolished. The general effect was to stimulate transfers of land. Creditors recognized for the first time the value of real estate in affording to them the safest security for their claims. It is a matter of history that all genuine reforms and nearly all moves tending to the betterment of social or commercial conditions are met by violent opposition. This is true of the advancement made in the law of conveyancing, and especially of the recording acts just mentioned. Land owners who were obliged to pledge their land as security for one or more loans, were seriously opposed to having made public the fact of their straightened circumstances. But as in other contests, that which is best will eventually survive, and the publicity feature of the recording acts has proven itself to be no exception to the rule. It is by virtue of this beneficent idea that land began to play the important role it now occupies in our economic and industrial life. Under its benign influence devolutions of title began to multiply. The country developed and has continued to develop at a rapid pace. With the development of land came increased values, and advancing values logically resulted in more frequent conveyances of the fee as well as in providing the best known security for loans and the extension of credit. While this development continues from year to year, it must be apparent to all that a new condition in relation to land titles is gradually forcing itself upon us. This condition varies in proportion to the length of time that has elapsed since the Government issued a patent to the first grantee. We frequently find in the older communities that the same land has been conveyed in fee dozens of times; that numerous liens have from time to time been fastened upon it and that various charges or other incumbrances have at different periods affected the title. Even though publicity prevails, and the laws charge all persons with notice of that which the public records disclose, it can not be denied that a careful examination of those records with a view of ascertaining the condition of a title is a matter of no small importance, and can be done only at an expense usually of considerable time and money. He who undertakes to examine the recorded documents must not only look to their sufficiency in form, but must likewise know their legal effect. With the frequent change of ownership, either by purchase or descent, together with divers incumbrances and occasional litigation, the title grows more complex. It in time arrives at that stage where the layman can do little more than hazard a guess as to its true condition.

With the increasing complexity of titles has arisen a demand for the careful inspection of the same before acceptance by the intending purchaser

or by the lender as security for a loan. This examination should be made by a skilled attorney or by some person well versed in the law of real property. Since it would be almost an endless task to make a proper examination by resorting to the records in the first instance, a demand has been created for a new profession. It is the profession of abstract maker. The field of the competent abstract maker and the ends achieved by means of a well prepared abstract of title are so favorably known that their value need not be further commented upon in this connection. While the profession of the abstract maker is a noble calling, and the pleasure of making a legal examination of an abstract of title is not to be despised, it must be admitted by all fair-minded persons that the system thus employed is to a very great extent cumbersome, dilatory and expensive. The twentieth century in its onward rush of progress is calling for and demanding a system of greater simplicity; one which will expedite business in the shortest possible time and one in which the expense will be reduced to a minimum.

Here again, as many times before, the needs of the hour are met by legislation designed to solve in a highly practical manner the perplexing problems presented under the recording acts previously mentioned. The one great law which is bringing about the desired reforms is what is known and designated as the Torrens law. For the history of this law, we must, as in a former case (the Australian Ballot), turn to the Island-Continent Australia. It was here in 1857 that Sir Robert Torrens, an English Knight, by his own efforts worked into practical form for the province of South Australia that system of land transfers, which, with some modifications, has been enacted into law by several of the states of the Union. The Torrens law, it will be observed, retains the name of its originator, and titles brought under its operations are for want of a better name, known as Torrens titles.

Before treating of the operation, effect and benefits of the Torrens law, it is perhaps better at this point to fix clearly in mind the great fundamental principle upon which the Torrens system differs from the old system of recording with which all are familiar. As was said in the beginning, the end and aim of various laws from time to time has been to render titles safe from attack. In this respect the Torrens law no doubt marks the culmination of human endeavor. It provides that any land owner to whom has been issued a Torrens certificate of title, shall in law conclusively, be presumed to be the owner of the land described in such certificate. Any intending purchaser or mortgagee, in order to be fully protected need only notice the fact that the vendor or mortgagor is possessed of a Torrens title. Under the Torrens registration system the law reaches out to the *title* itself, and proceeds to set it at rest against the world. Under the old method of recording deeds and other written instruments no such far-reaching results have yet been obtained. A deed recorded in the regular way is always open to contest and must remain, to a limited degree at least, a possible object of future controversy. A deed is not, nor is the record of a deed ever conclusive evidence, but *prima facie* evidence only. And herein arises the main distinction: under the Torrens law the *title* is registered; under the recording laws only the *deed* is registered. While the fundamental principles of all Torrens laws are necessarily the same, it is not essential, however, that the minor provisions relating to the details

of the method of making the practical application of the law should correspond. Such minor provisions should, and in fact, are so shaped, as to meet and harmonize as far as practicable with those laws already in force in each of the several states.

In treating of the operation of the law, it will be impossible to present more than a brief general view of the same, and while it might be interesting to make a comparative study of the methods and provisions of the system as practiced in Australia, England, Canada, Germany, Austria-Hungary, New Zealand and the several states of the Union now having registration acts, these observations will, in the main, relate more particularly to the practice in the State of Illinois.

To bring land within the provisions of the registration laws must, from the nature of the case, involve a private as well as a public duty. The land owner must make a request and signify his intention by filing a written application under oath, in a court designated for that purpose. The application is of the most simple form and usually includes the name, age, residence and domestic condition of the applicant; the description of the land and the nature of the estate or interest claimed; if the land is occupied by others than the applicant, then the names and addresses of such occupants and the nature of their interest or claim; a statement of the liens against the land and the names and addresses of the holders of such liens; the names and addresses of any other person, firm or corporation having or claiming any estate, interest or claim in law or equity and the character of such estate, interest or claim, and any other material facts connected with the land and of which the applicant has knowledge. This application is addressed to a court having chancery jurisdiction in the county where the land lies and power is given such court to inquire into the condition of the title, and to make all necessary orders, judgments and decrees, including the removal of clouds from the title, the establishing and declaring of the title or interest legal or equitable against all persons known or unknown, and to declare the order of preference of all liens and incumbrances. As soon as the application is filed, an order is entered referring the same to one of the examiners of titles appointed by the registrar. (In Illinois the law provides that the County Recorder shall ex-officio be the Registrar of titles.) The examiner then proceeds to examine into the title and the truth of the facts recited in the application. The examiner is given full power to administer oaths and examine witnesses, and may apply to the court for directions in any matter concerning his investigation. After his examination, he reports to the court in writing the substance of the proof and his conclusions therefrom. The court may then, according to the nature of the case, do any one of three things, viz.: it may enter an order that the registrar issue a certificate of title to the applicant or to such other person as may be entitled to the same; it may reject the application in toto, or it may defer entering a decree until such future time as may be deemed according to justice in the case. Upon the entry by the court of a decree, it is the duty of the clerk of the court, to file with the registrar a certificate of the substance or effect of the same or a copy thereof. Following the receipt of the clerk's certificate or copy of decree, it becomes the duty of the registrar to register the title pursuant to such decree. This is done by issuing to the declared owner

a certificate of title known as "First Certificate." Such certificate shall be under the official seal of the registrar, and besides being given a serial number, shall bear date the day and year issued. It shall state whether the owner (except in the case of a corporation) is married or not, and if married, the name of the husband or wife. If the owner is a minor, it shall state his age, or if under any other legal disability, the nature of the same. The certificate shall further show in such a manner as to preserve their priorities, the particulars of all estates, mortgages, incumbrances and charges to which the owner's title is subject. As an aid in circumventing fraud and to preserve evidence of the handwriting of the owner, it is the duty of the registrar to take from the owner in every case where it is practicable, a receipt for the certificate of title or whatever paper shall be issued to him signed by the owner in person.

After land has been registered, all future dealings in relation thereto are made by like forms of deeds, mortgages, loans or other instruments as were at the time of registration or subsequently deemed sufficient in law for the purpose intended. It is, however, necessary that all such future dealings in order to have any force or effect whatever, must pass through the registrar's office and be properly noted on the memorial of such registered land. Thus a registered owner, desiring to transfer his title, makes a deed to the purchaser in the usual form which is filed with the registrar. The owner also surrenders his certificate of title to the registrar. The certificate of the grantor is taken up and cancelled, and a new certificate issued to the grantee. The same force and effect is given to all subsequent certificates as to the "First Certificate," and each succeeding certificate issued, contains a statement of all liens, if any, and their order of priority.

When a registered owner desires to create a lien in the nature of a mortgage, he executes the instrument in the regular way and files same with the registrar who, in turn, notes upon the memorial of the particular land the facts concerning such lien, and no binding force or effect shall be given to such mortgage until the required notation is entered by the registrar. The rule that dealings affecting registered land have no force until noted by the registrar, is not confined to sales and mortgages, but extends to tax sale certificates, *lis pendens* notices, judgments, decrees, levies under attachment or execution writs, mechanics' liens and all other forms of liens statutory or otherwise.

While thus briefly presenting a view of the operation and effect of a Torrens title upon the owner, there remains yet another popular feature of the system in regard to the manner of its application to other parties interested in, or having dealings in relation to the same. Since to err is human, it could not well be presumed that in the operation of such a system it would be entirely free from errors, or that fraud would not occasionally attempt to circumvent its true purpose. The experience of all other systems has proven conclusively that these elements are always to be reckoned with, and that any new system which did not overcome these dangers, might prove no better than the old. In this respect, the wise provisions of the Torrens system have again demonstrated its utility. Indemnity for errors or fraud is variously provided for by requiring that the registrar, as well as each examiner of titles under him, shall execute to the people of the state their several bonds under such penalty as is deemed sufficient to meet any liability created by errors on their part. In

addition to heavy penal bonds required, there is another provision requiring the establishment of an indemnity fund. This fund may be provided for in several ways. In some instances a small fraction (one-tenth of one per cent. in Illinois) of the value of the property is charged at the time the land is first brought under the act. In other cases a certain portion of the fees collected upon subsequent dealings is set aside. The indemnity fund might be created in other ways, but the two just noticed are perhaps the surest and simplest methods yet adopted. In this connection it might be well to state that in the category of so-called vulnerable points attacked by the opponents of Torrens legislation, there is, perhaps, no other feature at which have been aimed so many unfair, savage and almost cruel blows as this indemnity idea. The contention of the opponents is that the indemnity fund is too small, and in consequence it would be almost useless to bring valuable property under the provisions of the law. In justice and fairness to the Torrens system, however, it can truthfully be said that these particular thrusts of the opposition have little or no support when examined in the light of facts in countries and states where the system is today in successful operation. Thus in New South Wales, where more than 200,000 registered dealings were had, the average risk of error was only two and one-half cents for each transaction. In Queensland, the risk of error was only one and one-half cents for each registered dealing, and the number of transactions was nearly 250,000. In Tasmania and Western Australia not one penny has been paid since the law went into effect and under which hundreds of thousands of dealings have been had. In London, the claims upon the indemnity fund have averaged about one cent to each dealing. Coming nearer home, we find that in Cook County, Illinois, where over \$15,000,000 worth of property has been registered in the past ten years, not a cent for indemnity has yet been demanded. While the indemnifying idea has thus been the object of severe attack, it must be further noted that every vital principle has been challenged, and repeated attempts of the legislatures of the several states to enact Torrens laws have in a majority of cases been successfully thwarted by the opponents of the system. In some states its enemies have even secured the repeal of such laws, while in all the other states where they are in force, every possible hindrance is interposed to hamper and discredit their operation. Strange as it may seem, this opposition does not emanate from the land owner, but largely from individuals, firms and corporations, whose business it is to prepare abstracts of title and from (we dislike to admit it) members of the legal profession who profess to see in its operation the elimination of repeated substantial fees charged for the examination of abstracts and the rendering of written legal opinions on the same. It is noteworthy that in numerous instances the fees for making an abstract have exceeded the value of the land, and when repeated charges for the legal examinations are included, it is evident that the old system is frequently more of a burden than a blessing.

A brief summary of the advantages of this new system will be noted in bringing this chapter to a close. The benefits derived naturally fall into two well recognized classes. Those which accrue to the owner are of first importance, chief among which is the knowledge that such title is safe beyond question. Again, the owner can, with ease, accuracy and with no expense whatever

exhibit his title to any intending purchaser or to any person to whom application for credit may be made. Lastly, but very important, is the elimination of the burdensome toll levied from time to time for expensive abstracts and consequent legal examinations of title, as no abstracts or examinations will be required when land is once registered. Many sales are lost to land owners through delay in securing abstracts and upon frequent technical and trivial objections presented in the opinions of the examining attorneys. The second class of persons benefited is the public at large, and particularly those who may have or who contemplate commercial dealings with the owner personally, or in relation to the land. Thus a mortgagee can, in a few minutes, learn the nature of his security when registered land is offered and a loan can be closed within a few hours after the application is received. The value of being able to make a loan almost instantaneously is certainly apparent to the lender. The prospective buyer can repair to the office of the registrar, and in a few minutes of time with no expense, may know the exact condition of the vendor's title. In the case of judgment creditors, it is frequently a difficult matter to ascertain whether or not the judgment debtor has land which might be subject to execution, but if the debtor's land is registered, the task becomes comparatively easy. A benefit which accrues to the public at large as registration becomes general, may be said to consist of the elimination of a horde of unskilled conveyancers whose bungling efforts have caused, and continue to cause, useless trouble and expense. For it must be remembered that all deeds, mortgages or other documents intended to operate in connection with registered land are given a critical examination in the office of the registrar before they are given the effect of conveyances, liens or otherwise.

August 22, 1908.

JACOB M. SHERBAHN.

APPENDIX C.

TO REAL PROPERTY.

WARRANTY DEED.—LONG FORM.

THIS INDENTURE, MADE this.....day of
..... in the year of our Lord One Thousand Nine Hun-
dred.....BETWEEN
.....of the.....of.....
in the county of.....and State of
.....party of the first part, and.....
.....of the.....of.....
in the County of.....and State of.....
party of the second part:

WITNESSETH, That the said party of the first part, for and in consider-
ation of the sum of.....
Dollars in hand paid by the said party of the second part, the receipt whereof
is hereby acknowledged, and the said party of the second part forever released
and discharged therefrom, ha... granted, bargained, sold, remised, released,
conveyed, aliened and confirmed, and by these presents do... grant, bargain,
sell, remise, release, convey, alien and confirm, unto the said party of the
second part, and to.....heirs and assigns FOREVER, all the following
described lot..., piece..., or parcel...of land, situated in the.....
of.....County of.....and State of
.....and known and described as follows, to wit:
.....
.....

TOGETHER WITH ALL AND SINGULAR The hereditaments and appur-
tenances thereunto belonging, or in anywise appertaining, and the reversion
and reversions, remainder and remainders, rents, issues and profits thereof;
and all the estate, right, title, interest, claim or demand whatsoever, of the
said party of the first part, either in law or equity, of, in and to the above
bargained premises, with the hereditaments and appurtenances: To HAVE
AND TO HOLD the said premises above bargained and described, with the
appurtenances, unto the said party of the second part,.....heirs
and assigns, FOREVER.

AND The said.....
party of the first part, for.....heirs, executors and admin-
istrators, do... covenant, grant, bargain and agree, to and with the said
party of the second part,.....heirs and assigns, that at the time
of the ensembling and delivery of these presents,.....well seized
of the premises above conveyed, as of a good, sure, perfect, absolute and
indefeasible estate of inheritance in law, in fee simple, and ha... good right,

full power, and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and encumbrances, of what kind or nature soever; and the above bargained premises, in the quiet and peaceable possession of the said party of the second part, ...heirs and assigns, against all and every other person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will WARRANT AND FOREVER DEFEND.

AND The said party of the first part hereby expressly waive... and release... any and all right, benefit, privilege, advantage and exemption, under or by virtue of any and all Statutes of the State of..... providing for the exemption of homesteads from sale on execution or otherwise.

IN WITNESS WHEREOF, The said party of the first part..... hereunto set.....hand.... and seal...., the day and year first above written.

SIGNED, SEALED AND DELIVERED IN }(SEAL.)
THE PRESENCE OF }(SEAL.)
..... }(SEAL.)
..... }(SEAL.)

STATE OF..... } ss.
COUNTY OF..... }

I, ...
.....in and for said County, in the State aforesaid, DO HEREBY CERTIFY That.....

personally known to me to be the same person... whose name...
.....subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that... he... signed, sealed and delivered the said Instrument as.....free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given Under my hand and.....Seal, this
.....day of.....A. D. 190...

WARRANTY DEED.—STATUTORY FORM.

THIS INDENTURE WITNESSETH, THAT THE GRANTOR...
.....
of the.....in the County of.....

and State of.....for and in consideration of the sum of
DOLLARS, IN HAND PAID,
 CONVEY... AND WARRANT... to.....

County of.....and State
 of.....the following described Real Estate,
 to-wit:

.....
 situated in the.....of.....in the
 County of.....in the State of.....
 hereby releasing and waiving all rights under and by virtue of the Homestead
 Exemption Laws of this State of.....

DATED, This.....day of.....A. D. 190...
(SEAL.)
(SEAL.)
(SEAL.)
(SEAL.)

STATE OF..... }
 COUNTY OF..... } ss.

I,.....
in and for said County, in the
 State aforesaid, DO HEREBY CERTIFY That.....

 personally known to me to be the same person... whose name...
subscribed to the foregoing instrument, appeared before
 me this day in person, and acknowledged that.... he... signed, sealed
 and delivered the said Instrument as.....free and voluntary
 act, for the uses and purposes therein set forth, including the release
 and waiver of the right of homestead.

Given Under my hand and.....Seal, this
day of.....A. D. 190...

QUIT CLAIM DEED.—LONG FORM.

THIS INDENTURE, Made this.....day of.....
 in the year of our Lord one Thousand Nine Hundred.....
 BETWEEN.....

 of the.....in the County of.....
 and State of.....party of the first part, and.....

.....of the.....in the County of.....
and State of.....party of the second
 part.

WITNESSETH, That the said party of the first part, for and in considera-
 tion of..... Dollars,
 in hand paid by the said party of the second part, the receipt whereof is hereby
 acknowledged, and the said party of the second part forever released and
 discharged therefrom, ha.....remised, released, sold, conveyed, and
 quit-claimed, and by these Presents do.....remise, release, sell, con-
 vey, and QUIT-CLAIM, unto the said party of the second part,.....
 heirs, and assigns, FOREVER, all the right, title, interest, claim, and demand,
 which said party of the first part ha.....in and to the following described
 lot , piece , or parcel of land, situated in the County of.....
and State of.....and known and described as
 follows, TO WIT:

.....

 *TO HAVE AND TO HOLD THE SAME, together with all and singular the
 appurtenances and privileges thereunto belonging, or in any wise thereunto
 appertaining; and all the estate, right, title, interest, and claim whatever,
 of the said party of the first part, either in law or equity, to the only proper
 use, benefit and behoof of the said party of the second part,.....
 heirs, and assigns, forever.

AND the said party of the first part hereby expressly waive and re-
 lease any and all right, benefit, privilege, advantage, and exemption, under
 or by virtue of any and all Statutes of the State of Illinois, providing for the
 exemption of homesteads from sale on execution or otherwise.

IN WITNESS WHEREOF, the said party of the first part.....
 hereunto set..... hand and seal the day and year first above
 written.

SIGNED, SEALED, AND DELIVERED IN	}	(SEAL.)
IN THE PRESENCE OF		(SEAL.)
.....		(SEAL.)
.....		(SEAL.)

STATE OF.....	}	ss.
COUNTY OF.....		

I, ...
 in and for said County, in the State aforesaid, Do HEREBY CERTIFY, that

 personally known to me to be the same person... whose name.....
 subscribed to the foregoing Instrument appeared before me this day in person,
 and acknowledged that ...he... signed, sealed, and delivered the said
 Instrument as free and voluntary act, for the uses and purposes
 therein set forth, including the release and waiver of the right of homestead.

GIVEN under my hand and.....seal,
 this.....day of.....A. D. 190....

QUIT CLAIM DEED.—STATUTORY FORM.

THIS INDENTURE WITNESSETH, that the Grantor.....

 of the.....in the County of.....
 and State of.....for the consideration of.....
 DOLLARS,
 CONVEY...AND QUIT-CLAIM...to

 of the County of.....and State
 of.....all interest in the following described Real Estate, to-wit:

 situated in the County of.....in the State of Illinois, hereby
 releasing and waiving all rights under and by virtue of the Homestead Ex-
 emption Laws of this State of.....

DATED, this.....day of A. D. 190..
(SEAL.)
(SEAL.)
(SEAL.)
(SEAL.)

STATE OF }
 COUNTY OF } ss. I,.....
in and for said County, in the
 State aforesaid, DO HEREBY CERTIFY That.....

 personally known to me to be the same person..whose
 name.....subscribed to the foregoing instru-
 ment, appeared before me this day in person, and ac-
 knowledged that ...he...signed, sealed and delivered
 the said Instrument as free and voluntary
 act, for the uses and purposes therein set forth, including
 the release and waiver of the right of homestead.

GIVEN Under my hand and.....Seal,
 this.....day of.....A. D. 190..

REAL ESTATE MORTGAGE.—STATUTORY FORM.

THIS INDENTURE WITNESSETH, THAT THE MORTGAGOR.....

 of the.....in the County of.....
 and State of.....MORTGAGE... AND WAR-
 RANT..., to.....
of the.....County of.....
and State of.....to secure the
 payment of.....certain promissory note...executed by.....

.....
bearing even date herewith, payable to the order.....
.....

.....
the following described real estate, to wit:.....
.....

.....
situated in the County of.....in the State of Illinois,
hereby releasing and waiving all rights under and by virtue of the Homestead
Exemption Laws of the State of Illinois, and all right to retain possession of
said premises after any default in payment or breach of any of the covenants
or agreements herein contained.

BUT IT IS EXPRESSLY PROVIDED AND AGREED, That if default be made
in the payment of the said.....promissory note..., or any part
thereof, or the interest thereon, or any part thereof, at the time and in the
manner above specified for the payment thereof, or in case of waste or non-
payment of taxes or assessments on said premises, or of a breach of any of
the covenants or agreements herein contained, then and in such case the whole
of said principal sum and interest, secured by the said.....
promissory note... in this mortgage mentioned, shall thereupon, at the option
of the said mortgagee..., ...heirs, executors, administrators,
attorneys or assigns, become immediately due and payable: And this mort-
gage may be immediately foreclosed to pay the same by said mortgagee...,
.....heirs, executors, administrator..., attorneys or assigns;
And it shall be lawful for the said mortgagee.....heirs, executors,
administrators, attorneys or assigns, to enter into and upon the premises
hereby granted, or any part thereof, and to receive and collect all rents, issues
and profits thereof.

UPON THE FILING OF ANY BILL To foreclose this mortgage in any
court having jurisdiction thereof, such court may appoint.....
or any proper person receiver, with power to collect the rents, issues and profits
arising out of said premises during the pendency of such foreclosure suit, and
until the time to redeem the same from any sale that may be made under any
decree foreclosing this mortgage shall expire; and such rents, issues and profits
when collected may be applied toward the payment of the indebtedness and
costs herein mentioned and described. And upon the foreclosure and sale
of said premises, there shall be first paid, out of the proceeds of such sale all
expenses of advertisement, selling and conveying said premises, and.....
dollars attorneys' or solicitor's fees, to be included in the decree, and all
moneys advanced for taxes, assessments, and other liens; then there shall be
paid the principal of said note... whether due and payable by the terms
thereof or not, and the interest thereon.

DATED, This.....day of.....A. D. 190...
.....(SEAL.)
.....(SEAL.)
.....(SEAL.)

STATE OF..... }
COUNTY OF..... } ss.

I, ...
.....in and for said County, in the
State aforesaid, DO HEREBY CERTIFY That.....
.....
personally known to me to be the same person... whose name...
.....subscribed to the foregoing instrument, appeared before
me this day in person, and acknowledged that.... he....signed, sealed
and delivered the said Instrument as.....free and voluntary
act, for the uses and purposes therein set forth, including the release
and waiver of the right of homestead.

Given Under my hand and.....Seal, this
.....day of.....A. D. 190...
.....
.....

TABLE OF CASES.

CASES CITED IN SEVENTEENTH SUBJECT—REAL PROPERTY.

- Allen vs. Palmer, (1 Leon., 101) 131.
 Alpass vs. Watkins (8 T. R., 516), 130.
 Ashton vs. Ashton (1 Collest. Jur., 402), 137.
 Avelyn vs. Ward (1 Ves., 422), 67.
 Austen vs. Taylor (Ambl., 358), 133.
 Badger vs. Lloyd (1 Ld. Raym., 523), 96.
 Bagshaw vs. Spencer (2 Atk., 581), 139.
 Bate vs. Coleman (2 Vern., 670), 133.
 Baxton vs. Lever (Cro. Eliz., 388), 121.
 Berrington vs. Parkhurst (3 Atk., 135), 65.
 Beverly vs. Beverly (Vern., 131), 64.
 Blackburn vs. Stables (2 Ves. & B., 371), 135.
 Blanford vs. Applin (4 T. R., 82), 132.
 Brownsword vs. Edwards (2 Ves., 610), 100.
 Brown vs. Cairus (63 Kan., 584), 52.
 Buchanan vs. Whitman (151 N. Y., 253), 52.
 Bunter vs. Cook (1 Salk., 237), 102.
 Burchett vs. Durdant (3 Ventr., 311), 65.
 Bushby vs. Greenslate (1 Str., 445), 134.
 Candler vs. Smith (7 T. R., 531), 132.
 Chapman vs. Blissett (Cas. Temp. Talb., 145), 73.
 Clare vs. Clare (Forrest, 21), 99.
 Clarke vs. Day (Moor, 593), 135.
 Clarke vs. Smith (1 Lutw., 798), 95.
 Cock vs. Cooper (1 East, 22), 132.
 Cogan vs. Cogan (Cro. Eliz., 360), 70.
 Colthirst vs. Bejushin (Plowd., 23), 70.
 Condon vs. Brockway (157 Ill., 90), 52.
 Cotton vs. Heath (1 Rol. Abr., 612), 97.
 Coulson vs. Coulson (2 Atk., 247), 133.
 Crooke vs. De Vandes (9 Ves., 197, 203), 94.
 Crump vs. Norwood (2 Marsh., 161), 93.
 Cusack vs. Cusack (1 Bro. P. C., 470), 129.
 Dansey vs. Griffiths (4 Maul. & S., 61), 94.
 Davis vs. Norton (2 P. Wms., 390), 67.
 Doe vs. Weston (2 Bos. & P., 324), 93.
 Doe vs. Lyde (1 T. R., 593), 97, 99.
 Doe vs. Fonnereau (Dougl., 504), 67, 73.

Fortescue vs. Abbott (Pollexf., 479), 68.

Foy vs. Hinde (Cro. Jac., 679), 69.

French vs. Cadell (3 Bro. P. C.), 96.

Ginger vs. White (Willes, 348), 134.

Glenorchy vs. Bosville (Cas. Temp. Talb., 19), 139.

Goodright vs. Dunham (Dougl., 251, 264), 66, 134.

Goodtitle vs. Billington (Dougl., 725), 70.

Gore vs. Gore (2 P. Wms., 28), 96, 99.

Gulliver vs. Ashley (Fearn. Ex. Dev., 60), 71.

Gulliver vs. Wicket (Wils., 105), 93.

Hayter vs. Rod (1 P. Wms., 360), 130.

Heath vs. Heath (1 Bro. C. C., 147), 93.

Hodgson vs. Ambrose (Dougl., 337), 133.

Hodsol vs. Bussey (Forrest, MSS.; S. C., 2 Atk., 89), 130.

Hoe vs. Gerils (Palm., 136), 93.

Hopkins vs. Hopkins (Forrest, 44), 73, 100.

Ives vs. Legge (3 T. R., 484), 66.

Jones vs. Morgan (1 Bro. C. C., 206), 133.

Jones vs. Morgan (1 Bro. C. C., 220), 142.

Keene vs. Dickson (3 T. R., 495), 67.

King vs. Burchall (4 T. R., 296), 136.

King vs. Melling (1 Vent., 225, 232), 136.

King vs. Rumball (Cro. Jac., 448), 68.

Lamb vs. Archer (1 Salk., 225), 98.

Lawsey vs. Lowdell (2 Rol. Abr., 253), 134.

Leake vs. Robinson (2 Meriv., 363), 94.

Leanord vs. Earl of Sussex (2 Vern., 526), 137, 139.

Legg vs. Goldwire (Cas. Temp. Talb., 20), 130.

Loddington vs. Kyme (1 Ld. Raym., 203), 136.

Long vs. Blackall (7 T., R., 100), 98.

Long vs. Beaumont (1 P. Wms., 229), 65.

Love vs. Windham (1 Mod., 50), 98, 99.

Lowe vs. Davies (2 Ld. Raym., 1561), 134.

Lytton vs. Lytton (4 Bro. C. C., 441), 96.

Maundrell vs. Maundrell (7 Ves., 567), 66.

Moore vs. Parker (4 Mod., 316), 73.

Napper vs. Sanders (Hutt., 119), 64, 66.

Oakes vs. Chalfont (Pollexf., 38), 99.

Page vs. Hayward (2 Salk., 570), 122.

Papillon vs. Voice (2 P. Wms., 471), 132.

- Peacock vs. Spooner (2 Vern., 43, 195), 130.
 Pearson vs. Vickers (5 East, 548), 132.
 Pells vs. Brown (Cro. Jac., 590), 93, 122.
 Perrin vs. Blake (4 Burr., 2579), 139.
 Peters vs. Balke (170 Ill., 304), 52.
 Poole vs. Poole (3 Bos. & P., 627), 132.
 Price vs. Price (2 Ves., 234), 130.
 Proctor vs. Bishop of Bath (2 Hen. Bl., 358), 96.
 Purefoy vs. Rogers (2 Saund., 380), 95, 102.
 Pybus vs. Mitford (1 Vent., 372), 128.
- Roberts vs. Kingsley (1 Ves., 238), 129.
 Robinson vs. Cumming (Cas. Temp. Talb., 114), 122.
 Roe vs. Aistrop (2 Bl. Rep., 1228), 131.
 Rundale vs. Eley (Cart., 170), 132.
- Sands vs. Dixwell (2 Ves., 652), 130.
 Sayer vs. Hardy (Cro. Eliz., 414), 69.
 Sayer vs. Masterman (Fearn. Cont. Rem., 250), 132.
 Scatterwood vs. Edge (1 Salk., 229), 67.
 Sheffield vs. Ratcliffe (2 Rol. Rep., 418), 121, 122.
 Shapland vs. Smith (1 Bro. C. C., 75), 138.
 Shuttleworth vs. Barber (2 Mod., 7), 71.
 Smith vs. Clifford (1 T. R., 728), 121.
 Smith vs. Biddall (2 Mod., 289), 94.
 Snow vs. Cutler (Raym., 162), 73.
 Southby vs. Stonehouse (2 Ves., 610), 100.
 Stapilton vs. Stapilton (1 Atk., 2), 122.
 Stephens vs. Stephens (Forr., 228), 94.
 Stephens vs. Bretridge (T. Rayme., 36), 126.
 Stevens vs. Winning (2 Wils., 219), 123.
 Streatfield vs. Streatfield (Forrest., 176), 130.
 Sweetapple vs. Bindon (2 Vern., 536), 133.
- Theebridge vs. Kilburne (2 Ves., 233), 130.
 Thomson vs. Leach (12 Mod., 174), 72.
 Thong vs. Bedford (1 Bro. C. C., 313), 140.
 Thong vs. Bedford (1 Bro. C. C., 313), 138.
 Trevor vs. Trevor (1 P. Wms., 662), 129.
- Walter vs. Drew (Com. Rep., 372), 97.
 Wealthy vs. Bosville (Rep. Temp. Hardw., 258), 95.
 Webb vs. Webb (1 P. Wms., 132), 130.
 Webb vs. Herring (Cro. Jac., 416), 68.
 Whitfield vs. Bewitt, 2 P. Wms., 240), 66.
 Wilkinson vs. South (7 T. R., 555), 99.
- Venables vs. Morris (7 T. R., 342), 128, 138.

CASES CITED IN EIGHTEENTH SUBJECT—ABSTRACTS.

- Allen vs. Armstrong (16 Iowa, 508), 215.
Applegate vs. Edwards (45 Ind., 329), 200.
Apperson vs. Bolton (29 Ark., 418), 190.
Attwood vs. Wright (29 Ala., 346), 203.
- Barry vs. Gamble (8 Mo., 88), 177.
Bassett vs. Lockard (60 Ill., 164), 203.
Bass vs. Estil (50 Miss., 300), 167.
Bishop vs. O'Connor (69 Ill., 431), 185.
Bishop vs. Schneider (46 Mo., 472), 167.
Blachard vs. Ware (37 Iowa, 305), 208.
Bowen vs. Wickersham (124 Ind., 404), 201.
Brock vs. Frank (51 Ala., 89), 190.
Brooks vs. Bruyn (35 Ill., 394), 217.
Browne vs. Ferrea (51 Cal., 552), 203.
Buckley vs. Gray (110 Cal., 339), 241.
Burdick vs. Briggs (11 Wis., 126), 212.
Butterworth vs. Crawford (46 N. Y., 349), 236.
- Cady vs. Purser (131 Cal., 552), 167.
Cambridge Bank vs. Delano (48 N. Y., 326), 163, 165.
Campbell vs. McCahan (41 Ill., 45), 207.
Capehart vs. Dowery (10 W. Va., 130), 205.
Carpenter vs. Sherby (71 Ill., 427), 200.
Cary vs. Whitney (48 Me., 516), 221.
Chapman vs. Lee (55 Ala., 616), 161.
Chase vs. Heaney (70 Ill., 268), 157.
Coleman vs. Billings (90 Ill., 577), 217.
Crockett vs. McGuire (10 Mo., 34), 163.
Crosby vs. Dowd (61 Cal., 557), 202.
Cummings vs. Rogers (36 Minn., 317), 222.
- Davenport vs. Whisler (46 Iowa, 287), 221.
Davis vs. Life Ins. Co. (84 Ill., 508), 196.
Dean vs. Bittner (77 Mo., 101), 177.
DeWolf vs. Hayden (34 Ill., 525), 179.
Dickie vs. Abstract Co. (89 Tenn., 431), 158.
Dills vs. Hubbard (21 Ill., 328), 217, 218.
Doe vs. Eslava (11 Ala., 102), 218.
Dodd vs. Williams (3 Mo. App., 278), 240.
Dundee Mfg. Co. vs. Hughes (20 Fed. Rep., 39), 157.
- Elwell vs. Shaw, (16 Mass., 42), 183.
Edgerton vs. Bird (6 Wis., 527), 217.
Espey vs. Anderson (14 Pa. St., 308), 160.
Evans vs. Ashley (8 Me., 177).

- Ferrett vs. Taylor (9 Cranch. (U. S.), 50), 176.
 Ford vs. Wilson (35 Miss., 504), 218.
 Fowler vs. Shear (7 Mass., 14), 183.
- Galpin vs. Abbott (6 Mich., 17), 167.
 Gambert vs. Hart (44 Cal., 543), 239.
 Given vs. Marr (27 Me., 212), 212.
 Grant vs. Fowler (39 N. H., 104), 218.
 Gridley vs. Watson (53 Ill., 186), 200.
 Grey vs. Tubbs (43 Cal., 364), 222.
 Guynn vs. McCauley (32 Ark., 97), 205.
- Hackett vs. Callender (32 Vt., 97), 234.
 Hamilton vs. Boggess (63 Mo., 233), 217.
 Hale vs. Woods (10 N. H., 470), 183.
 Happin vs. Doty (25 Wis., 573), 234.
 Hastings vs. Cutler (25 N. H., 483), 167.
 Hellreigel vs. Manning (97 N. Y., 56), 230.
 Hill vs. Wall (66 Cal., 130), 202.
 Hinson vs. Adrian (86 N. C., 61), 211.
 Holland vs. Holmes (14 Fla., 390), 229.
 Houston vs. Houston, (67 Ind., 276), 200.
 Howe vs. Hutchinson (105 Ill., 501), 161.
 Hughes vs. Watt (26 Ark., 228), 185.
 Hunt vs. Townsend (31 Md., 336), 186.
- Jackson vs. Warren (32 Ill., 331), 208.
 Jones vs. Wood (16 Pa. St., 25), 221.
- King vs. Goodwin (16 Mass., 63), 203.
- Lampman vs. Milsk (12 N. Y., 505), 235.
 Langdeau vs. Hanes (21 Wall. (Mass.), 521), 177.
 Lenox vs. Clark, (52 Mo., 115), 185.
 Leitch vs. Wells (48 N. Y., 585), 208.
 Lewis vs. Owen (64 Ind., 446), 201.
 Little vs. Paddleford (13 N. H., 167), 160.
 Loomis vs. Riley (24 Ill., 307), 208.
 Loughridge vs. Bowland (52 Miss., 546), 167.
- Mabury vs. Ruiz (58 Cal., 11), 211.
 MacCready vs. Sexteon (29 Iowa, 356), 215.
 Maxwell vs. Stewart (22 Wall., 77), 201.
 McDonald vs. Bear River Co. (13 Cal., 235), 183.
 McNab vs. Young (81 Ill., 11), 230.
 Moore vs. Chandler (59 Ill., 466), 191.
 Morrill vs. Graham (27 Tex., 646), 240.
 Morrison vs. King, (62 Ill., 30), 235.
 Morris vs. Robey (73 Ill., 462), 203.

Musgrove vs. Bonser (5 Ore., 313), 167.

Musick vs. Barney (40 Mo., 458), 167.

Newman vs. Willetts (52 Ill., 98), 190.

Oakes vs. Williams (107 Ill., 154), 199.

Owen vs Reed (27 Ark., 122), 186.

Pensonneau vs. Bleakley (14 Ill., 15), 183.

Perkins vs. Swank (43 Miss., 349), 234.

Pettit vs. Black (13 Neb., 142), 189.

Pinney vs. Fellows (51 Vt., 525), 234.

Pitts vs. Melser (72 Ind., 469), 189.

Pomeroy vs. Stevens (11 Met. (Mass.), 244,) 165.

Pringle vs. Dunn (37 Wis., 449), 167.

Railway Co. vs. Chicago (53 Ill., 80), 200.

Rawson vs. Fox (55 Ill., 200), 217.

Redden vs. Miller (65 Ill., 336), 234.

Reed vs. Lukens (44 Pa. St., 200), 221.

Riddle vs. Bush (27 Tex., 675), 185.

Russell vs. Sweezy (22 Mich., 235), 234.

Savings Bank vs. Ward (100 U. S., 195), 158.

Savings Bank vs. Ward (100 U. S., 195), 241.

Scott vs. Simpson (11 Heisk. (Tenn.), 310), 229.

Scott vs. Elkins (83 N. C., 424), 217.

Security Co. vs. Longacre (56 Neb., 469), 157.

Sibley vs. Smith (2 Mich., 486), 215.

Sigourney vs. Larned (10 Pick. (Mass.) ,72), 167.

Skillen vs. Wallace (36 Ind., 319), 239.

Slewers vs. Commonwealth (87 Pa. St., 15), 158.

Smith vs. Robertson (23 Ala., 312), 229.

Snell vs. Insurance Co. (98 U. S., 85), 221.

Spangler vs. Sellers (5 Fed. Rep., 882), 240.

Swann vs. Lindsey (70 Ala., 507), 176.

Steeple vs. Dowing (65 Ind., 501), 215.

Stevens vs. Brooks (24 Wis., 326), 217.

Strother vs. Lucas (12 Pet. (U. S.), 454), 176.

State vs. Jennings (10 Ark., 428), 183.

Streeter vs. Williams (48 Pa. St., 450), 222.

Tankard vs. Tankard (79 N. C., 54), 165.

Tapley vs. Wright (61 Ark., 275), 158.

Thompson vs. Ware (43 Iowa, 455), 215.

Tilton vs. Hunter (29 Me., 29), 163.

Tucker vs. Shade (25 Ohio St., 355), 200.

Turney vs. Yeoman (16 Ohio, 24), 215.

Turpin vs. R. R. Co. (105 Ill., 11), 227.

- Vass vs. Johnson (41 Ind., 19), 203.
 Ventres vs. Cobb (105 Ill., 33), 186.
 Wakefield vs. Chowen (26 Minn., 379), 158.
 Walker vs. Doan (108 Ill., 236), 199.
 Warder vs. Cornell (105 Ill., 169), 223.
 Ward vs. Lumber Co. (70 Wis., 445), 182.
 Warren vs. Richmond (53 Ill., 54), 223, 234.
 Webb vs. Richardson (42 Vt., 465), 217.
 Willamette, etc., Co. vs. Gordon, Mathews (53 Ala., 1), 189.
 Wilson vs. Hunter (30 Ind., 466), 163.
 Wilson vs. Russ (20 Me., 421), 240.
 Winter vs. Crommelin (18 How. (U. S.), 87), 177.
 Wood vs. Goodridge (6 Cush. (Mass.), 117), 183.
 Zant vs. Zant (23 Ill., 536), 196.

CASES CITED IN NINETEENTH SUBJECT—MINING LAW.

- Anderson vs. Caughey (84 P., 223), 288.
 Armstrong vs. Lower (6 Colo., 393), 291.
 Back vs. Sierra Nevada Consol. Min. Co. (1888), (2 Idaho, 420), 271.
 Barden vs. Northern Pac. R. R. Co. (19 U. S. App., 131), 261.
 Beals vs. Cone, supra., 291.
 Beaver Co. vs. St. Vrain Co. (6 Colo. App., 130), 287.
 Bishop vs. Baisley (43 P., 936), 289.
 Black vs. Elkhorn Min. Co. (1896) (163 U. S., 762), 270.
 Bliss vs. Kingdom (46 Cal., 651), 297.
 Bonner vs. Meikle (1897) (82 Fed. Rep., 697), 269.
 Boston vs. Jones (56 N. W., 515), 297.
 Brady vs. Husby (33 P., 801), 278.
 Bullion County vs. Croesus Co. (2 Nev., 176), 265.
 Burns vs. Clark (1901) (133 Cal., 634), 259.
 Caldwell vs. Fulton (3 M. R., 238), 297.
 Calhoun Gold Min. Co. vs. Ajax Gold Min. Co. (1899) (27 Colo., 178), 285.
 Calhoun Gold Min. Co. vs. Ajax Min. Co. (1901) (182 U. S., 507), 271.
 Chambers vs. Herrington, (111 U. S., 350), 289.
 Cheesman vs. Shreeve (40 F., 787; 17 M. R., 260), 277.
 Clayton vs. Gregson (5 Ad. & El., 302), 247.
 Coal Run Coal Co. vs. Jones (137 Ill., 379), 247.
 Doherty vs. Morris (289, 85), 288.
 Dower vs. Richardson (151 U. S., 661), 261.
 Dunlap vs. Pattison, (42 P., 504), 264.

- Eberle vs. Carmichael (8 N. Mex., 169), 258.
Echardt vs. Boaro (1885) (113 U. S., 536), 268.
Ellet vs. Campbell (1893) (18 Colo., 510), 295.
Erwin vs. Perego (C. C. A., 1899) (93 Fed., Rep. 608), 268.
- Fitzgerald vs. Clark (1895) (17 Mont., 100), 283.
- Gill vs. Westeon (110 Pa. St., 313), 247.
Godfrey vs. Faust (101 N. W., 118), 288.
Gwillim vs. Donnellan (115 U. S., 45), 298.
- Hall vs. Equater Min., etc., Co. (1879) (11 Red. Cas., No. 5, 931), 285.
Harvey vs. Ryan (4 M. R., 490; 42 Cal., 62), 258.
Harvey vs. Ryan (4 M. R., 490; 42 Cal., 626), 257.
Henry vs. Lowe (73 Mo., 96), 247.
Hirschler vs. McKendricks (40 P., 290), 289.
Honaker vs. Martin (27 P., 397), 289.
Horner vs. Watson (14 M. R., 1; 79 Pa., 242), 297.
- Iron Silver Min. Co. vs. Sullivan (5 McCreary (U. S.), 274), 286.
Iron Silver Min. Co. vs. Sullivan (1883) (16 Fed. Rep., 829), 267.
Iron Silver Min. Co. vs. Elgin Min., etc. (1886) (118 U. S., 206).
- Johnson vs. Towsley (13 Wall (U. S.), 83), 260.
Johnson vs. McLaughlin (1 Ariz., 493), 255.
- Keeler vs. Trueman (1890) (15 Colo., 143), 270.
Kendall vs. San Juan Silver Min. Co. (144 U. S., 658), 261.
King vs. Amy, etc., Min. Co. (152 U. S., 222), 284.
King vs. Edwards (1 Mont., 235), 258.
King vs. Amy, Min., etc., Co. (1894) (152 U. S., 227), 268.
- Leadville Min. Co. vs. Fitzgerald (1879) (15 Fed. Cas., No. 8, 158), 267.
Lee vs. Stahl (1886) (9 Colo., 208), 295.
Little Josephine Min. Co. vs. Fullerton (C. C. A., 1893) (58 Fed. Rep., 521), 285.
- Mallett vs. Uncle Sam Co. (1 M. R., 1 Nev., 188), 287.
Marrow vs. Flimby, etc., Coal Co. (1898) (2 Q. B., 599), 247.
Marvin vs. Brewster Co. (13 M. E., 40; 55 N. Y., 538), 297.
McGinnis vs. Egbert (8 Colo., 41), 287.
McKinley vs. Wheeler (1889) (130 U. S., 635), 263.
McKinley Co. vs. Alaska Co. (183 U. S., 563), 263.
Merrit vs. Judd (6 M. R., 62; 14 Colo., 59), 287.
Montana Ore Purchasing Co. vs. Boston, etc., Consol. Copper, etc., Min. Co. (1903) (27 Mont., 536), 284.
Mountain Silver Min. Co. vs. Willis (127 U. S., 471), 258.
Mt. Rosa Min., etc., Co. vs. Palmer (1899) (94 U. S., 762), 270, 273.
Muldrick vs. Brown (1900) (37 Oregon, 185), 269.
Murley vs. Ennis (2 Col., 300), 264.
Murray vs. Allred (100 Tenn., 100), 247.

- Nans vs. Victoria Co. (160 U. S., 318), 279.
 Nesbitt vs. Delmar's Nevada Gold Min. Co. (1898) (24 Nev., 273), 295.
 Noyes vs. Mantle (127 U. S., 348), 286.
- Omar vs. Soper (11 Colo., 380), 298.
- Packer vs. Heaton (9 Cal., 569), 289.
 Pelican Co. vs. Snodgrass (9 Colo., 339), 291.
 People vs. District Ct. (11 Colo., 147), 255.
 Peoria Co. vs. Turner (79 P., 915), 278.
 Plumer vs. Hillsids Co. (104 F., 208), 297.
 Pujade vs. Ryan (33 P., 660), 278.
- Queen vs. Earl of Northumberland (Plowd. 336), 250, 251.
 Quimby vs. Conlan (104 U. S.), 260.
- Raisbeck vs. Anthony, (4 K. N. W., 72), 266.
 Remmington vs. Bandit (9 Pac., 819), 289.
 Reynolds vs. Iron Silver Min. Co. (116 U. S., 687), 286.
 Riborado vs. Quang Pang M. Co. (6 p. 125), 257.
 Robbins vs. Milwaukee, etc., R. R., (19 U. S. App., 636) 261.
 Rosenthal vs. Ives (2 Idaho, 244), 257.
 Rosse vs. Wainnam (14 M. & W., 859), 247.
- Shepley vs. Cowan (91 U. S., 330), 260.
 Southern Cross Co. vs. Europe Co. (15 Nev., 383), 279.
 Stevens vs. Williams (1879) (1 McCrary (U. S.), 488), 267.
 Steel vs. St. Louis Smelting, etc., Co. (106 U. S., 447), 260.
 Strepey vs. Stark (7 Colo., 618), 277.
 St. Louis Smelting, etc. Co. vs. Kemp, (1879) (21 Fed. Cas., No. 12, 239a.), 273.
 St. Louis Co. vs. Kemp., (104 U. S., 636) 288.
 Sullivan vs. Schultz (1899) (22 Mon., 541), 260.
- Teller vs. U. S. (C. C. A.), 1901 (113 Fed. Rep., 273), 281.
 Thompson vs. Spray (72 Cal., 528), 298.
 Thompson vs. Spray (1117) (72 Cal., 531), 263.
 Titcomb vs. Kirk (51 Colo., 288), 297.
 Trevaskis vs. Peard (44 P., 246), 287.
- Union Co. vs. Leitch (64 P., 829), 278.
 Unta Tunnel Min., etc., Co. vs. Creede, etc., Min. Co. (C. C. A., 1902) (119 Fed Rep., 169), 268.
 Upton vs. Larkin (6 P., 66), 278.
 U. S. vs. Iron Silver Co. (24 F., 568), 288.
 U. S. vs. Marshall Silver Min. Co. (1899) (129 U. S., 589), 295.
 U. S. vs. Trinidad Coal, etc., Co. (1890) (137 U. S., 168), 263.
 U. S. vs. Gear (3 How. (U. S.), 120, 261.

Vice vs. Thomas (Stan., p. 35), 249.

Watervale Mining Co. vs. Leach (Ariz.) (1893) (33 Pac. Rep., 418), 257.

Wheeler vs. Smith (5 Wash., 704, 260.

Wilcox vs. Jackson (13 Pet. U. S., 498), 261.

Williams vs. Gibson (16 M. R., 243), 298.

Wilson vs. Triumph Co. (569, 300), 289.

INDEX.

SEVENTEENTH SUBJECT—REAL PROPERTY.

C

Canons of Descent.	88- 89
Coke, Sir Edward.	26
Covenants.	112
Common.	113
Curtesy.	47

D

Deeds, in General.	145
Common Law Original.	145
Common Law Derivative.	145
Under Statute of Uses.	145
Modern.	148
Requisites of.	109
Parts of.	110
Material on Which Written.	110
Necessity for Writing.	110
Signing.	110
Sealing.	110
Delivery.	114
Devise.	92
Delivery of Deed.	114
In Escrow.	114
Dower, Forms of.	48

E

Easements.	32
Emblements.	33
Enjoyment of Land.	28
Estates, Distinguished From Titles.	34
Classification of as to Quantity.	35
Of Inheritance.	36
Of Fee Simple.	36
In Fee-Tail.	36
For Life.	37
Conventional.	45
Legal.	45
Less than Freehold.	51
For Years.	52
At Will.	52
From Year to Year.	52

At Sufferance.....	52
Classification of, as to Quality.....	55
Fee-Conditionals.....	56
On Condition.....	56
On Limitation.....	58
Conditional Limitations.....	59
Classification as to Time of Enjoyment.....	61
Reversions.....	61
Remainders.....	61
Classification as to Number of Owners.....	77
In Joint Tenancy.....	77
In Common.....	78
By Entirety.....	79
In Coparcenary.....	79
In Partnership.....	80
Merger of.....	143
Executory Devise.....	106

F

Feudal System.....	11- 18
Fixtures.....	33
Freeholds.....	33

G

Grants, Public.....	90
Private.....	91
Grantors.....	109
Grantees.....	109

H

Habendum.....	111
Hereditaments.....	31
Incorporeal.....	31
Homesteads.....	50

I

Incorporeal Hereditaments.....	31
--------------------------------	----

J

Joint Tenancies.....	77
----------------------	----

L

Land, what Included Under Term.....	29
Description of.....	115
American System of Parceling.....	116
Littleton.....	23
Livery of Seisin.....	19

O

Ownership, Definition.....	27
----------------------------	----

P

Plats.	118
Possession, Definition of.	28

R

Real Property, Definition of.	11
Remainders.	61
General Rules Governing.	61
Classification of.	62
Contingent.	63, 75
Restrictions.	58

S

Seisin.	19- 21
Shelley's Case, Rule in.	121-142
Subdivisions.	118

T

Tenancies, in Common.	78
Tenements.	30
Tenendum.	111
Titles, Distinguished from Estates.	34
Classification.	81
Original.	82
By Discovery.	84
By Occupancy.	84
By Conquest.	84
By Cession.	85
By Descent.	85
By Purchase.	89
By Grant.	90
By Devise.	92
By Operation of Law.	105
Arising from Natural Causes.	105
Arising from Civil or Political Elections.	105
Arising from Public Policy.	107
By Prescription.	107

EIGHTEENTH SUBJECTS—ABSTRACTS.

A

Abstracts, Definition of.	151
Actions and Proceedings.	197
Adverse Titles.	216
Agreements for Conveyance.	221
Attachment.	197

C

Clouds upon Titles.....	233
Compilation of Abstracts.....	168
Congressional Grants.....	176
Conveyance by Delegated Authority.....	183
Corporate Conveyances.....	181

D

Deeds of Conveyance.....	178
Descents.....	191
Doctrine of Notice.....	163
Duty of Furnishing Abstract.....	159

E

Essentials of Abstracts.....	159
Examiner's Duties and Liabilities.....	159

F

Flaws in the Title.....	231
Formal Parts of an Abstract.....	170

I

Indexes and References.....	167
Insolvency and Bankruptcy.....	219
Inquiries in Pais.....	233

J

Judicial and Execution Sales.....	202
Judgment and Decrees.....	198

L

Leases.....	223
Liability for Erroneous Opinions.....	239
Liens, Charges and Incumbrances.....	193
Lis Pendens.....	195

M

Miscellaneous Evidence.....	225
-----------------------------	-----

O

Official Conveyances.....	184
Opinions of Title.....	236

P

Patents.....	176
Probate Proceedings.....	190

R

Registration.....	165
-------------------	-----

S

Substance of the Abstract—Initial Statements.....	172
---	-----

T

Taxes and Titles.	212
Testamentary Conveyances.	187
The American Method of Abstracts.	152
The English Method of Abstracts.	152

W

What Titles Should be Shown.	229
-----------------------------------	-----

NINETEENTH SUBJECT—MINING LAW.

A

Abandonment.	287
Agents, Location of Mining Claims by.	264
Annual Labor, Effect of.	287

C

Coal Lands.	273
Cross Veins.	284

D

Eminent Domain.	297
----------------------	-----

F

Forfeiture.	287
To Co-owner.	280

L

Lands, Who May Locate.	263
Location by Agents.	264
Lode.	265
Tunnel.	270
Placer.	272
Re-location of.	291
Location, Formal Parts of.	277
Notice.	278
Recording.	279
Estate Secured by.	284
Defective, Rights under.	284
Lodes.	265

M

Mines, Definition.	247
Comparison between Civil Law and Common Law Rules as to	
Ownership.	248
Royal.	249
Laws Governing.	253
United States Statutes.	253

State Statutes	255
Rules of Mining Districts	255
Mining Customs	257
Mining Law, a Branch of the Law of Real Property.....	248
Mining Titles, Sources in the United States.	251
Minerals, Definition	247
Mineral Lands, Open to Purchase.....	259
P	
Patents, for Mining Claims	291
Placer Claims.....	273
R	
Re-location of Claim	291
T	
Tunnel Claims.	270
V	
Veins.	284
Cross Veins	270

Table of Contents by Subjects

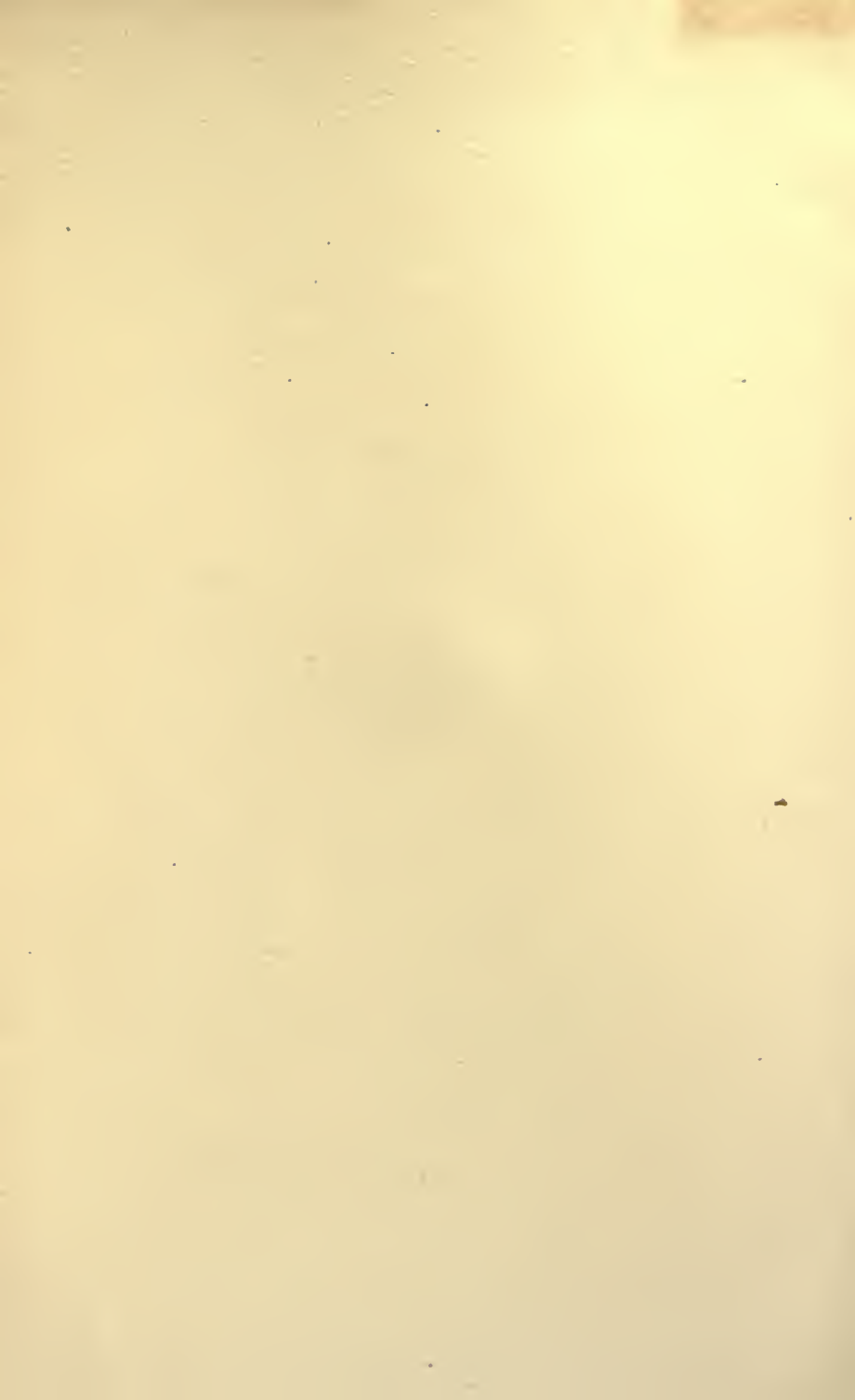
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						Public Corporations, XXV		
		{	Wrongs Against the Public	{	Criminal Law, XXX			
	Criminal Procedure, XXXI							
		{	Property.	{	Real Property, XVII			
	Abstracts, XVIII							
	Mining Law, XXIX							
	Personal Property, XIV							
	Patents, XV							
	Copyrights, XVI							
	Wills, XXXII							
					{	Contracts With their various subdivisions	{	Contracts, VI
	Agency, VII							
	Sales, XI							
Bailments, XII								
Carriers, XIII								
Partnership, XXIII								
Private Corporations, XXIV								
Bills and Notes, XXVI								
Guaranty and Suretyship, XXVII								
Insurance, XXVIII								
	{	Equity....	{	Equity Jurisprudence, XX				
Trusts, XXI								
Private Law	{	Torts, VIII	{					
	{	Domestic Relations, X	{					
	{	Adjective Law	{	Common Law Pleading, XXXIV				
Equity Pleading, XXII								
Code Pleading, XXXV								
Federal Procedure, XXXVI								
Evidence, XXXVII								
Damages, IX								
Administration, XXXIII								
Bankruptcy, XXIX								
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		Private, XXXIX						
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